CLERK'S COPY

13162

55

1105

DC

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 95.

AMERICAN ICE COMPANY AND WILLIAM G. JOHNSON, ASSIGNEE, APPELLANTS,

*vs.*

EASTERN TRUST AND BANKING COMPANY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 11, 1901.

(18,152.)

13163

(18,152.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1902.

No. 95.

---

AMERICAN ICE COMPANY AND WILLIAM G. JOHNSON, ASSIGNEE, APPELLANTS,

*vs.*

EASTERN TRUST AND BANKING COMPANY.

---

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

---

INDEX.


| | Original. | Print. |
|---|---|---|
| Caption (No. 1013) | *a* | *a* |
| Transcript from supreme court of the District of Columbia (No. 17259). | *a* | *a* |
| Transcript on appeal and cross-appeal, Nos. 800 and 801 in Court of Appeals, No. 17259 in supreme court of the District of Columbia | 1 | 1 |
| Original bill to foreclose, &c. | 1 | 1 |
| Exhibit A—Transcript in case of Eastern Trust and Banking Co. *vs.* Willis *et al.*, No. 425 in Court of Appeals, Nos. 36903 and 36904 in supreme court of the District of Columbia | 11 | 11 |
| Caption | 11 | 11 |
| Complaint of landlord against tenant, judgment 36903 | 11 | 11 |
| Plea of title | 12 | 12 |
| Declaration in plea of title | 14 | 14 |
| Statement of fact, etc | 15 | 15 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 10, 1902.

| | Original. | Print |
|---|---|---|
| Exhibit No. 1—An act to incorporate the Eastern Trust and Banking Company | 18 | 18 |
| No. 2—Trust mortgage | 21 | 21 |
| No. 4—Agreement between William G. Johnson, assignee, and Edward M. Willis | 29 | 29 |
| Judgment, 36903 | 31 | 31 |
| Judgment, 36904 | 32 | 32 |
| Notice of appeal | 32 | 32 |
| Citation | 33 | 33 |
| Opinion, 36903 and 36904 | 33 | 33 |
| Stipulation, 36903 and 36904 | 36 | 36 |
| Clerk's certificate, 36903 and 36904 | 37 | 37 |
| Separate answer of Corcoran Fire Insurance Company | 37 | 37 |
| Joint and separate answer of the defendants, American Ice Company and Edward M. Willis | 39 | 39 |
| Separate answer of William G. Johnson, assignee | 45 | 45 |
| Deposition of George B. Canney and stipulation | 49 | 49 |
| Notary's certificate | 55 | 55 |
| Foreclosure account expenses, American Ice Company | 55 | 55 |
| Trustee's sale of real estate of the American Ice Company | 57 | 57 |
| Notice of adjourned trustee's sale | 59 | 59 |
| Notice of sale of wharf property of the American Ice Company | 59 | 59 |
| Complainant's Exhibit 1—Request of committee to sell property separately | 60 | 60 |
| Examiner's certificate | 61 | 61 |
| Stipulation of counsel | 61 | 61 |
| Testimony of John Miller | 62 | 62 |
| Examiner's certificate | 72 | 72 |
| Exhibit J. A. L. No. 9—Stipulation as to use of printed record | 72 | 72 |
| No. 10—Stipulation as to payment of amount of insurance policies to William G. Johnson | 73 | 73 |
| Decree for sale | 74 | 74 |
| Appeal by complainant and defendants | 76 | 76 |
| Memoranda: $100 deposited by complainant in lieu of appeal bond | 76 | 76 |
| $100 deposited by defendant Johnson in lieu of appeal bond | 76 | 76 |
| Stipulation as to transcript of record | 77 | 77 |
| Clerk's certificate | 79 | 79 |
| Testimony on behalf of complainant | 80 | 81 |
| Testimony of George B. Canney | 80 | 81 |
| Benning C. Additon | 102 | 92 |
| Exhibit G. B. C. No. 1—Statement of account between Eastern Banking and Trust Company and American Ice Company | 107 | 94 |

| | Original. | Print |
|---|---|---|
| Exhibit G. B. C. No. 2—Voucher for disbursement by Eastern Trust and Banking Company | 109 | 95 |
| No. 3—Voucher for disbursement by Eastern Trust and Banking Company | 109 | 95 |
| No. 4—Voucher for disbursement by Eastern Trust and Banking Company | 110 | 95 |
| No. 5—Voucher for disbursement by Eastern Trust and Banking Company | 110 | 95 |
| No. 6—Voucher for disbursement by Eastern Trust and Banking Company | 111 | 96 |
| No. 7—Voucher for disbursement by Eastern Trust and Banking Company | 111 | 96 |
| No. 8—Voucher for disbursement by Eastern Trust and Banking Company | 112 | 96 |
| No. 9—Voucher for disbursement by Eastern Trust and Banking Company | 112 | 97 |
| No. 10—Voucher for disbursement by Eastern Trust and Banking Company | 113 | 97 |
| No. 11—Voucher for disbursement by Eastern Trust and Banking Company | 113 | 97 |
| No. 12—Voucher for disbursement by Eastern Trust and Banking Company | 114 | 97 |
| No. 13—Voucher for disbursement by Eastern Trust and Banking Company | 114 | 98 |
| No. 14—Voucher for disbursement by Eastern Trust and Banking Company | 115 | 98 |
| No. 15—Voucher for disbursement by Eastern Trust and Banking Company | 115 | 98 |
| No. 16—Voucher for disbursement by Eastern Trust and Banking Company | 116 | 99 |
| No. 17—Voucher for disbursement by Eastern Trust and Banking Company | 116 | 99 |
| No. 18—Voucher for disbursement by Eastern Trust and Banking Company | 117 | 99 |

| | Original. | Print |
|---|---|---|
| Exhibit G. B. C. No. 19—Voucher for disbursement by Eastern Trust and Banking Company | 117 | 99 |
| No. 20—Voucher for disbursement by Eastern Trust and Banking Company | 118 | 100 |
| No. 21—Voucher for disbursement by Eastern Trust and Banking Company | 118 | 100 |
| No. 22—Voucher for disbursement by Eastern Trust and Banking Company | 119 | 100 |
| No. 23—Voucher for disbursement by Eastern Trust and Banking Company | 119 | 100 |
| No. 24—Voucher for disbursement by Eastern Trust and Banking Company | 120 | 101 |
| No. 25—Voucher for disbursement by Eastern Trust and Banking Company | 120 | 101 |
| No. 26—Voucher for disbursement by Eastern Trust and Banking Company | 121 | 101 |
| No. 27—Receipts for dividends | 122 | 102 |
| No. 28—Sale of property of the American Ice Company and disbursements | 124 | 102 |
| No. 29, No. 1—Transcript of entries relating to American Ice Company as they appear on the cash book of the Eastern Trust and Banking Company | 126 | 104 |
| No. 29, No. 2—Transcript of entries appearing on record of foreclosure book of the Eastern Trust and Banking Company | 129 | 106 |
| No. 29, No. 3—Transcript of entries appearing on record of foreclosure book of the Eastern Trust and Banking Company | 130 | 106 |
| No. 30—Power of attorney | 131 | 107 |
| Order referring cause to auditor | 133 | 108 |
| Order amending reference to auditor | 134 | 109 |
| Auditor's report | 135 | 109 |
| Schedule A with auditor's report | 147 | 115 |
| Schedule B with auditor's report | 149 | 117 |
| Testimony of John Miller | 150 | 118 |
| Cause calendared | 152 | 119 |
| Motion to strike from calendar | 152 | 119 |
| Decree of sale | 155 | 123 |
| Appeal and order for citation | 159 | 123 |
| Citation | 160 | 123 |

| | Original. | Print |
|---|---|---|
| Memorandum: Deposit in lieu of appeal bond | 161 | 124 |
| Stipulation as to what shall constitute record on appeal | 161 | 124 |
| Order extending time for filing transcript in Court of Appeals | 162 | 124 |
| Clerk's certificate | 163 | 125 |
| Minutes of argument | 126 | 127 |
| Opinion | 127 | 127 |
| Decree | 130 | 132 |
| Order allowing appeal | 131 | 132 |
| Bond on appeal | 132 | 132 |
| Citation and service | 133 | 133 |
| Clerk's certificate | 134 | 134 |

# In the Court of Appeals of the District of Columbia

---

AMERICAN ICE COMPANY and WM. G. JOHNSON, Assignee, Appellants,
*vs.*
EASTERN TRUST AND BANKING COMPANY.
} No. 1013.

---

*a* Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY
*vs.*
AMERICAN ICE COMPANY ET AL.
} No. 17259. In Equity.

UNITED STATES OF AMERICA,
*District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

# In the Court of Appeals of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, Appellant,
*vs.*
AMERICAN ICE COMPANY *et al.* } No. 800.

and

AMERICAN ICE COMPANY *et al.*, Appellants,
*vs.*
EASTERN TRUST AND BANKING COMPANY. } No. 801.

*a* In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, Plaintiff,
*vs.*
AMERICAN ICE COMPANY *et al.*, Defendants. } Equity. No. 17259.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Original Bill to Foreclose a Mortgage, for an Accounting, &c.*

Filed March 25, 1896.

In the Supreme Court of the District of Columbia

EASTERN TRUST AND BANKING COMPANY, a Corporation, Plaintiff,
*vs.*
AMERICAN ICE COMPANY, a Corporation; Wm. G. Johnson, Assignee; Edward M. Willis, Corcoran Fire Insurance Company of the District of Columbia, a Corporation; Lincoln Fire Insurance Company of the District of Columbia, a Corporation; Riggs Fire Insurance Company, a Corporation, Defendants. } In Equity. No. 17259, Doc. No. 40.

To the supreme court of the District of Columbia, sitting as a court of equity:

The bill of complaint of the above-named plaintiff respectfully shows:

First. That it is a body corporate, duly organized under and by virtue of a special charter granted by the State of Maine, and engaged in carrying on a general trust and banking business, and has its principal office in the city of Bangor, in said State, and brings this suit as trustee under a certain mortgage or deed of trust hereinafter more particularly described; that the defendant American Ice Company is a body corporate, duly organized under the laws of the State of Maine for the purpose of dealing in ice, and had until the 14th day of October, 1893, its principal office or place of business in said city of Bangor, in said State, but since said date has had no office or place of business; that the said company is sued in its own right; that the
*and* defendant William G. Johnson is a citizen of the United
2 States, a resident of the District of Columbia, and is sued as the assignee of said American Ice Company under a certain deed of assignment hereinafter more particularly referred to; that the defendant Edward M. Willis is also a citizen of the United States, a resident of the District of Columbia, and is sued in his own right as the tenant in possession of the hereinafter-described real estate; that the defendants Corcoran Fire Insurance Company of the District of Columbia, Lincoln Fire Insurance Company of the District of Columbia, and Riggs Fire Insurance Company are all bodies corporate organized under the laws of the United States relating to the District of Columbia, having their respective offices in said District, and engaged in business as underwriters of insurance against loss or damage by fire on properties situate and located in said District, and are sued in their own rights respectively.

Second. That heretofore, to wit, on the second day of December, 1889, the said American Ice Company executed and delivered to the plaintiff company a certain deed of trust in the nature of a mortgage, hereinafter referred to as "said mortgage," and, after reciting a vote of the members of said American Ice Company and an issue pursuant thereto of the coupon notes or bonds of said company to the amount of $40,000, payable to said Eastern Trust and Banking Company or the bearer, in instalments of five thousand dollars (5,000) each, in three, four, five, six, seven, eight, nine, and
ten years from December 1st, 1889, respectively, with six per
3 cent. interest, payable semi-annually, thereby conveyed to the plaintiff company all of the real estate, wharves, ice-houses, boarding-house, stables, boiler, elevator, and machinery situate in the town of Hampden, in the county of Penobscot, State of Maine, and in the city of Washington, in the District of Columbia, the description of such part of said real estate as was and is located in the city of Washington being as follows:

All that piece or parcel of land, with the improvements thereon, lying in the city of Washington, in the District of Columbia, and being opposite square two hundred and seventy (270), in said city and District, commencing for the same at the southeast corner of square numbered two hundred and seventy, running thence southerly with the west line of Thirteenth street to the channel of the Potomac river; thence westerly with said channel to a point oppo-

site the southwest corner of said square numbered two hundred and seventy; thence due north to the said southwest corner of said square two hundred and seventy, following the eastern line of what is alleged to be Thirteen-and-a-half street; thence with the southern line of said square two hundred and seventy two hundred and fifty-five (255) feet one (1) inch to the place of beginning, together with all improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining, and all the remainders, reversions, rents, issues, and profits thereof, and all the estate, right, title, interest, claim and demand, either at law or in equity or otherwise however, of the said parties of the first part of, in, to, or out of the said piece or parcel
of ground and premises, being the same premises conveyed
4 by E. M. Willis and another to said American Ice Company by indenture dated December second, 1889, and recorded in the land records of the District of Columbia, Book 1445, page 16, together with all the rights and easements, appurtenant-, privileges, or options in the matter of wharving or other riparian rights of any kind whatsoever which may hereafter be acquired by said American Ice Company by virtue of the covenants and agreements in said deed of Willis and another contained, "for the purpose of securing the payment of said coupon notes or, more properly, bonds and interest, and to that end in and by said mortgage covenanted and agreed with the plaintiff company, trustee, that if the said American Ice Company should pay the principal and interest of said bonds according to their tenor and all the coupons attached to said bonds according to their tenor, etc., that the said mortgage should be void, but that if default should be made in the payment of any of said bonds at maturity or of any coupons, etc., and such default should continue for ninety days, then the whole amount of the principal of said bonds and all accrued and unpaid interest thereon (unless such default be waived by the holders of the majority of the bonds then outstanding) shall be deemed immediately due and payable, and it shall be lawful for the trustee (the plaintiff herein) to enter upon said premises and property and take possession thereof and proceed to make sale thereof for the payment of said outstanding bonds and interest and convey to the purchaser, and that said power of sale (the terms whereof are fully set forth in
said mortgage) should be cumulative, with the ordinary
5 remedy of foreclosure by entry or suit therefor; and the said company also covenanted and agreed with said trustee to keep said premises at all times properly insured against loss by fire in such companies as may be approved by the trustee, in such amounts as shall reasonably protect all the insurable property embraced in the terms of the grant, payable in case of loss to the trustee, as its interest may appear;" all of which recital, conveyance, covenants, and provisions will at large appear by reference to the record of said mortgage in Liber No. 1439, folio 417, of the land records of the District of Columbia, which plaintiff prays leave to produce and read at the hearing as a part hereof, said mortgage

having been duly made of record both in said District and in said county of Penobscot, State of Maine.

Third. The bonds described in said mortgage were executed and delivered unto the plaintiff company, as recited therein, and were by said company delivered to the parties entitled thereto, as required by the terms and provisions of its trust; that said bonds were taken by the parties to whom they were delivered for value and in the regular course of business, before maturity, and are now held and owned by them or by their assigns or legal representatives, except as to the first instalment thereof, which fell due in December, 1892, and was paid, together with the interest then accrued and due on all of said bonds. The next instalment of said bonded indebtedness, which became due in December, 1893, was not paid at maturity, nor was the interest then falling due paid, nor have either of said sums or any part of them been since paid or satisfied in any manner whatsoever (except so far as the net proceeds realized from
6 the sale of the Maine property hereinafter mentioned extend).

By the terms and provisions of said bonds and mortgage the residue of said bonded indebtedness, to wit, the sum of $35,000 (less the net proceeds of said sale), together with the accrued interest thereon, are and ever since said default have been due and payable and none of the parties holding said bonds have ever waived said default.

Fourth. That after said default, to wit, on or about October 13th, 1893, the said American Ice Company, by an instrumnnt of writing of that date, made and delivered in due form of law an assignment of all its property of what kind soever for the benefit of its creditors unto the defendant William G. Johnson, which said deed of assignment was duly made of record in Liber No. 1847, folio 211 *et seq.*, one of the land records of said District, and it is prayed that said record may be considered as a part of this bill of complaint, and that the plaintiff may have leave to produce and read the same at the final or any other hearing herein accordingly; that said Johnson accepted said trust and entered upon the discharge thereof, in the course of which he, as such assignee, leased the hereinbefore-described property of the American Ice Company, situate in the city of Washington, unto the defendant Edward M. Willis by a written agreement dated January 29th, 1894, for the term of one year from said date, at the monthly rental of one hundred and thirty dollars, and the said Willis took possession under said lease, and the said Johnson is still the assignee of said American Ice Company, acting as such.

7 Fifth. After the default in the payment of said second instalment of bonds and of the interest on the bonded indebtedness as aforesaid had continued for the period of more than ninety days the said bondholders, or those holding more than fifty per centum of the total face value thereof, directed the plaintiff company, as trustee, to proceed in the execution of said trust in accordance with the terms and provisions thereof. In pursuance of such direction and in strict conformity with the terms of the power of sale contained in said mortgage, said trustee advertised for sale and

sold the property in said mortgage embraced and described at public auction at Bangor, Maine, on September 8th, 1894, to a committee acting for said bondholders, as follows: The portion of said real estate and personal property and property rights situate in the State of Maine, for the sum of fourteen thousand dollars, and the portion of said property situate and located in the District of Columbia and city of Washington, with all the rights, etc., thereunto appertaining, for the sum of fourteen thousand seven hundred and fifty dollars; in all, twenty-eight thousand seven hundred and fifty ($28,750.00) dollars; which prices plaintiff is advised and believes, and hence avers, were the best obtainable prices therefor; and, further, that said sale was in all respects fairly conducted; that the said committee have never perfected their purchase of the said Maine property and no deed has passed to them thereunder, but that they tender themselves ready and plaintiff is ready on its part to comply with the terms of said sale, and that the same is in effect completed, and that there will be realized therefrom, after deducting the trustee's commission and certain necessary dis-
8 bursements and expenses and the reasonable costs and expenses of said sale in conformity with the provisions of said trust, the sum of nine thousand one hundred seventy-three dollars and sixty-eight cents ($9,173.68) to be credited upon the residue unpaid of said bonded indebtedness and interest; that at the time of said sale said Edward M. Willis, as tenant under said lease from Johnson, assignee, was still in actual possession of the Washington property, and said sale as to said Washington property was made upon the condition and with the understanding between the purchasers and the trustee that the trustee should obtain for them possession of the property before the sale should be closed or considered complete. The plaintiff company accordingly, acting under the right of entry by said deed conferred, caused thirty days' notices to quit said premises, in the usual form, to be served upon both Johnson, assignee, and said Willis, to wit, on July 30, 1894, and upon the expiration of said notice caused a seven days' summons, under the provisions of the statute in such case made and provided, to be issued by Lewis I. O'Neal, a justice of the peace in and for said District, and the said two defendants appeared therein and interposed pleas of title, defendant Johnson pleading title in himself and the defendant Willis in the said Johnson; whereupon security was given as required by law, and the causes were duly certified by the justice to this court, holding a special term as a circuit court of law, for trial, and thereafter such proceedings were had that said causes were tried by a justice of this court upon an agreed statement of fact, and judgment by him rendered for the defendants, from which the plaintiff company prosecuted an appeal to the Court of Appeals of the District of Columbia; — court
9 afterwards, to wit, on the third day of June, 1895, reversed the said judgment and remanded said causes for entry of judgment by the lower court in favor of the plaintiff company, trustee; all of which will appear by reference to the record in said causes, being causes numbered 36903 and 36904 at law, consolidated,

on the docket of the lower court, and No. 425, January term, 1895, on the docket of the Court of Appeals. Plaintiff files herewith, for the purpose of convenient reference, a copy of the printed "Transcript of the Record" filed in said causes in the Court of Appeals, which is marked "Plaintiff's Exhibit A" and is prayed to be read and referred to, so far as material, a- a part hereof. The charter of the plaintiff company is copied in said transcript at pages 8, 9, and 10; the above-mentioned mortgage is copied in said transcript at pages 11 to 19, and the aforesaid lease from Johnson, assignee, to Willis is copied in said transcript at pages 19, 20, and 21, and said copies are correct and true copies and are referres to in connection herewith as a part hereof, so far as the same may be deemed material.

That the defendants Johnson, assignee, and Willis, within the time limited by law, sued out a writ of error from the Supreme Court of the United States to said Court of Appeals and gave a bond to supersede (which did legally supersede) the execution of said judgment for possession, and said causes are now pending before the said Supreme Court of the United States on said writ of error, and plaintiff is without power to further proceed at law to take
10 possession of said land and premises pending the final hearing in said court of last resort; which hearing plaintiff is advised and believes, and hence avers, cannot take place before about eighteen months from this present time; that plaintiff's counsel made an effort to expedite the disposition of said causes by moving to dismiss said writ of error for want of jurisdiction or to affirm said decision of the Court of Appeals, but said motion to dismiss was overruled, and said motion to affirm was deferred for consideration until the said causes should be reached for final hearing in regular course, as aforesaid.

Sixth. That owing to the failure of the plaintiff to obtain possession of said real estate and premises in accordance with the understanding and condition aforesaid the said committee representing said bondholders have receded from their said purchase of the Washington property and declared that they will not complete the same, but that the said sale is at an end and a nullity, and your complainant is without authority, right, or power to enforce a compliance with said sale, and hence avers that the same is now a nullity.

Seventh. That said Willis has ever since continued in possession of said property and is now in possession, and said Johnson has continued in the collection of rent under the terms of said lease, and plaintiff is advised and believes and avers that it is entitled and it is its duty as such trustee as aforesaid to demand an accounting from said Johnson for said rents from the time of the service of said thirty days' notice to quit on him, to wit, July 30, 1894, and that the same be applied on account of the indebtedness
11 secured by said deed or mortgage, and that this court, as a court of equity, will require such accounting to be rendered and made.

Eighth. Plaintiff shows further that said Johnson, as such as-

signee, acting for and in place of said American Ice Company, procured heretofore the writing of certain policies of insurance against loss or damage by fire on part of the improvements on said real estate, to wit, the frame ice-house then and at the time of the making of said deed or mortgage situate on a part of said land and premises, as follows—that is to say: In and by the defendant The Corcoran Fire Insurance Company of the District of Columbia, a policy of insurance in the usual form in the sum of one thousand dollars ($1,000); in and by the defendant The Lincoln Fire Insurance Company of the District of Columbia, a policy of insurance in the usual form in the further sum of one thousand dollars ($1,000), and in and by the Riggs Fire Insurance Company, a policy of insurance in the usual form in and for the further sum of one thousand dollars ($1,000); in all, three thousand dollars ($3,000), the said Johnson, as such assignee, as aforesaid, being the assured in each of said policies, and the premiums therefor having been paid him out of the assets of the said American Ice Company.

Ninth. That said policies of insurance were in full force and virtue on the 11th day of February, A. D. 1896, and that on said day said ice-house was totally destroyed by accidental fire, and that damage thereby resulted to a much greater amount than the combined amount of said policies, and that therefore there
12 accrued to the said Johnson, as such assignee, the assured, a claim for the sum of one thousand dollars against each of said companies, subject to the prerequisites of their respective policies as to proof of loss and elapsing of time before payment should be demandable, etc.; that said companies, through their proper officers, have, as plaintiff is advised and believes, and hence avers, waived their right to insist on the expiration of the said time limits, proof of loss, etc., and admit their present liability in the full amount of their respective policies; that plaintiff is advised and believes, and hence avers, that it is entitled to the proceeds of said policies, as trustee, by force of the insurance clause of said deed or mortgage above mentioned and which is in language following, viz:

"(Article 7.) The American Ice Company hereby expressly covenants and agrees * * * to keep said premises and property at all times insured in such insurance companies as may be approved by the trustee, in such amounts as shall reasonably protect all the insurable property, payable in case of loss to the trustee, as its interest may appear. In case of loss the insurance money may be applied by the trustee toward the renewal of or additions to the property destroyed or injured, or, at the option of the trustee, the money may either be retained and invested in such se- as it approves as a sinking fund for the redemption of the bonds when due or be applied to the payment of the principal of such of the aforesaid bonds as may be at the time due and unpaid and of the interest which may at that time have accrued upon the
13 principal and be unpaid, without discrimination or preference, and ratably to the aggregate amount of said unpaid principal and accrued and unpaid interest, rendering the surplus,

if any, to the American Ice Company or to whomever may be lawfully and equitably entitled to receive the same;" but that said Johnson, as such assignee, denies the right of the plaintiff company to receive and apply any part of said sum under the provision of said mortgage, but declares his intention of collecting said sums from said companies and applying the same to the payment of the claims of the general creditors under said assignment.

Plaintiff is advised and believes, and hence avers, that, by reason of said covenant to insure above quoted, the said insurance against fire effected by said Johnson, as trustee, must be deemed and held as between the plaintiff, as trustee, and the said Johnson, assured, as made for the benefit of the parties secured under said mortgage and pursuant to said covenant of the American Ice Company so to insure for their benefit, and that the plaintiff has accordingly a right or claim to said proceeds which a court of equity will recognize and enforce as a lien thereon, and that if the said company pay the same or any part thereof into court that the court will direct that the same be turned over to plaintiff, as trustee, to deal with the same in accordance with the provisions of its trust, and that if the said companies or any of them should pay said sums or any part thereof to the said assured that the court will, if necessary, enjoin him from carrying out his declared intention of distributing the said proceeds to or among the general creditors of said
14 ice company and require him to pay over or account for the same to the plaintiff, as trustee, and that if for any reason any of said companies should decline or neglect to pay said money into court or to said assured that the court will direct said Johnson, the assured, to take such action as may be necessary to collect said sums and to pay the same into court or to plaintiff, as trustee.

Tenth. Plaintiff shows further that not only has the said American Ice Company, the grantor in said deed or mortgage, become insolvent (as appears from its said assignment), but the value of the property of said company conveyed by said deed or mortgage has greatly depreciated in value, and the portion remaining unsold, to wit, that situate and located in the city of Washington, is inadequate in value to secure the unpaid portion of said bonded indebtedness and interest intended to be secured thereby, and, if offered for sale, would, as plaintiff is advised and believes, *at best* sell for an amount much less than the said unpaid portion of indebtedness; that the principal reason for this depreciation in value is that the real estate of said American Ice Company opposite square 270 above described is included in the claim of the United States Government in what is known as the Potomac Flats cases, in which cases said claim of title on the part of the Government has recently been sustained by the supreme court of the District of Columbia, and an appeal has been taken on behalf of the parties in possession to the Supreme Court of the United States, where the
15 same is now pending; that at the time said mortgage was executed said decision by the supreme court of the District of Columbia had not been made, and that the effect thereof has been to greatly diminish, if not to destroy, the markerable value of

the property affected and, if said decision is affirmed by the Supreme Court of the United States, will render parties in possession liable to eviction by the United States; that the property of the company in Maine, sold as aforesaid under said mortgage, had also at the time of this sale become and still is greatly less in marketable value than at the time of the execution of said mortgage, owing largely to the competition of companies manufacturing ice by artificial processes and the lessening demand for natural ice because of the recent perfection and increase of cold-storage plants in the principal cities, and that the same causes operate to depreciate the value of the Washington property.

Eleventh. Plaintiff is advised and avers that it would be greatly for the benefit of the beneficiaries or parties secured by said mortgage that receivers be appointed to take possession of the property of the American Ice Company in this jurisdiction and to manage the same and apply the rents, income, and profits thereof, under the direction of the court, and for the better security of said beneficiaries; and plaintiff is advised and avers that sufficient reasons exist and have been set forth to justify the court in appointing such receivers herein.

Twelfth. Plaintiff shows further that it is directed by a ma-
16 jority of the beneficiaries aforesaid to proceed to foreclose said mortgage, in order that such of the real and personal property and property rights of said company conveyed by said mortgage which are located or situate within this jurisdiction be sold before they further depreciate in value or be, as to the personality, injured, removed, or destroyed.

The premises considered, plaintiff company, trustee, being without remedy at law, brings this suit in equity, where matters of the sort are properly cognizable, and prays as follows:

*Prayers.*

1. That the United States writ of subpœna may issue, addressed to the defendants, commanding them to appear and true answer make to the exigencies of this bill.

2. That a receiver or receivers may be appointed to take possession of the property of the American Ice Company described in the mortgage above referred to, and which is situate or located in the city of Washington, and manage the same, and the rents, income, and profits thereof to apply under the directions of the court pending this suit.

3. That said defendant Johnson, as assignee of said American Ice Company, may be required to state and render an account to and with the plaintiff for all rents collected (and other income and profit, if any, derived by him from the real estate hereinbe-
17 fore described) from the date of the serving of the notice to quit on him above mentioned, to wit, July 30, 1894, to the time of such accounting, and that the plaintiff may be adjudged as trustee, as aforesaid, to be entitled to such moneys as may appear by said accounting to have been received and collected by the said

Johnson, as aforesaid, and that the said Johnson may be required to pay over the same to it accordingly.

4. That said defendants, The Corcoran Fire Insurance Company of the District of Columbia, The Lincoln Fire Insurance Company of the District of Columbia, and The Riggs Fire Insurance Company, may be allowed or ordered and directed by the court to pay the amounts of their respective policies of insurance above referred to into the registry of the court, there to abide the issue of this suit, and to be then paid to the plaintiff as trustee if its aforesaid claim thereto shall be established.

5. That if the court shall not deem it proper to grant the above prayer, or if for any other reason said insurance money or any part thereof should be paid to said Johnson, the assured, instead of into court, that the court will direct said Johnson to pay the said insurance money or such part as may be or may have been received by him into the registry of the court, to the end and for the purposes aforesaid.

6. That the plaintiff as trustee may be declared entitled to a lien upon the proceeds which are or may become payable to said Johnson, assignee, under and by virtue of said policies of insurance.

18 7. That the plaintiff company, as trustee, may be permitted and authorized to proceed in the further execution of its trust by making sale, under the supervision of the court, of the property of the American Ice Company aforesaid, the said plaintiff, as such trustee, to report said sale to the court and apply the proceeds thereof under its direction, or if the court shall deem it inadvisable that the plaintiff should conduct such sale, that then and in that event the court pass a decree for the sale of the aforesaid property for the satisfaction of the claims of the beneficiaries under said mortgage (so far forth as the proceeds of such sale will extend) and appointing a competent trustee or trustees to make such sale.

8. That plaintiff may have such other and further relief in the premises as the nature of the case may require.

The defendants to this suit are American Ice Company, a corporation; William G. Johnson, assignee; Edward M. Willis, Corcoran Fire Insurance Company of the District of Columbia, a corporation; Lincoln Fire Insurance Company of the District of Columbia, a corporation, and Riggs Fire Insurance Company, a corporation.

EASTERN TRUST AND BANKING COMPANY,
By GEO. B. CANNEY, *Secretary.*

B. F. LEIGHTON,
GEO. FRANCIS WILLIAMS,
*Solicitors for Plaintiff.*

[SEAL.]

19–21 COUNTY OF PENOBSCOT, *State of Maine,* } *To wit:*

I, George B. Canney, being first duly sworn, on oath say that I am the secretary of The Eastern Trust and Banking Company, plaintiff in the annexed bill of complaint; that I have read the said bill by it subscribed by me as secretary and know the contents thereof; that the facts therein stated as *knowledge* are true; that those stated upon information and belief I believe to be true.

GEO. B. CANNEY.

Subscribed and sworn to before me this 23d day of March, A. D. 1896.

DANIEL F. DAVIS,
*Notary Public.*

[SEAL.]

22 COMPLAINANT'S EX. "A."

In the Court of Appeals of the District of Columbia.

THE "EASTERN TRUST AND BANKING COMPANY," Appellant, *vs.* EDWARD M. WILLS and WILLIAM G. JOHNSON, Assignee. } No. 425.

Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING CO., Plaintiff, *vs.* EDWARD M. WILLIS, Defendant. } At Law. No. 36903.

EASTERN TRUST AND BANKING CO., Plaintiff, *vs.* WM. G. JOHNSON, Defendant. } At Law. No. 36904.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled causes, to wit:

*Judgment.*

Filed September 29, 1894.

*Complaint of Landlord Against Tenant.*

36903.

To Lewis I. O'Neal, justice of the peace for the District of Columbia:

Your complainant, Eastern Trust and Banking Company, a corporation duly established under a charter granted by the State of

Maine, respectfully represents that it is entitled to the possession of the lands, tenements, and premises lying opposite to square two hundred and seventy (270), in the city of Washington, in the District of Columbia, described by metes and bounds as follows, to wit: Commencing for the same at the southeast corner of said square two hundred and seventy (270), thence southerly with the west line of Thirteenth street to the channel of the Potomac river; thence
23 westerly with the said channel to a point opposite the southwest corner of said square; thence due north to the southwest corner of said square, following the eastern line of what is alleged to be Thirteen-and-a-half street; thence with the southern line of said square two hundred and fifty-five (255) feet and one (1) inch to the place of beginning, together with the improvements thereon and the rights and privileges thereto appertaining, and that the same are detained from it and held without right by one Edward M. Willis, of the District of Columbia, who became and was tenant by sufferance of the undersigned of said lands, tenements, and premises, and whose said tenancy and estate therein has been determined by the service of a thirty days' notice to quit on said Willis. Complainant therefore prays that a summons may be issued to a proper officer of said District, to be served upon said tenant by sufferance, holding over as aforesaid, commanding said tenant to appear before you on a day to be therein named, to show cause why judgment in favor of your complainant for the possession of said lands, tenements, and premises and costs accruing upon this application should not be rendered herein, agreeably to the act of Congress in such cases made and provided.

EASTERN TRUST AND BANKING COMPANY, *Complainant*,
By BENJAMIN F. LEIGHTON, *Its Attorney*.

Subscribed and sworn to before me this 17th day of September, A. D. 1894, by said Benjamin F. Leighton, as attorney for said corporation, complainant.

LEWIS I. O'NEAL, *J. P.* [SEAL.]

*Plea of Title.*

Filed September 29, 1894.

DISTRICT OF COLUMBIA, *County of Washington*, } *To wit:*

Before Lewis I. O'Neal, a justice of the peace in and for the District of Columbia, this 27th day of September, A. D. 1894.

EASTERN TRUST & BANKING CO., Plaintiff,
*vs.*
EDWARD M. WILLIS, Defendant. } No. 15280, 36903.

*Plea.*

Now comes the defendant in his proper person and, denying that he held the premises as in the written complaint of plaintiff alleged,

says that the title to the said premises is in Wm. G. Johnson, under whom defendant claims the said premises, and that the said title hereby claimed is not derived from any letting of the premises by the plaintiff (or by those under whom the plaintiff claims), and is not derived from any forcible entry or forcible detainer.

EDWARD M. WILLIS, *Defendant.*

24 Subscribed and sworn to before me this 27th day of September, A. D. 1894.

LEWIS I. O'NEAL, *J. P.* [SEAL.]

NOTE.—If the title is in the defendant, he will so state. If it be in another, under whom the defendant claims, he must name that other and say "that the title is in —— ——, under whom he claims the said premises."

*Rule Supreme Court District of Columbia Prescribing Above Form of Plea. 2d M. G. T., p. 559.*

RULE.—"In any and every proceeding instituted before a justice of the peace under and by virtue of section 684, chapter XIX, of the Revised Statutes of the United States relating to the District of Columbia, if upon the trial the defendant, in order to avail himself of the provisions of section 687 of the said Revised Statutes, wishes to plead title to the premises in himself or in another person under whom he claims the premises, the justice of the peace shall require the plea to be in writing and to be sworn to by the defendant. The plea shall be in the following (as given above) or equivalent form."

Any plea of the title not made as above required the justice shall treat as a nullity. Unless the plea of title be made as by this rule required, the proceedings before the justice shall not be suspended, but the justice shall go on with the trial and render judgment in the matter as the right of the case may require. Upon a plea of title being made by the defendant in conformity with this rule and upon the proceedings being certified to this court by the justice, the cause shall be docketed by the clerk and placed on the trial calendar in the same manner and subject to the same rules as appeals from a justice of the peace. The plaintiff shall, during the term of the circuit court occur-ing next after the pleading of title before the justice, file in said court a declaration making demand for the possession of the premises, and with a description thereof as in ejectment, and serve the defendant with a copy thereof. In any such declaration a general demand shall be sufficient to warrant an assessment of damages and intervening rent, as provided in section 690 of said Revised Statutes.

*Declaration in Plea of Title.*

Filed October 5, 1894.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, Plaintiff,
*vs.*
EDWARD M. WILLIS, Defendant.
} At Law. No. 36903.

The plaintiff sues the defendant to recover the following-described property, situated in the District of Columbia, to wit: All those certain lands, tenement-, and premises lying opposite to square number two hundred and seventy (270), in the city of Washington, in the District of Columbia, described by metes and bounds as follows, to wit: Commencing for the same at the southeast corner of said square two hundred and seventy, thence southerly with the west line of Thirteenth street to the channel of the Potomac river; thence westerly with the said channel to a point opposite the southwest corner of said square; thence due north to the southwest corner of said square, following the eastern line of what is alleged to be Thirteen-and-a-half street; thence with the southern line of said square two hundred and fifty-five (255) feet and one (1) inch to the place of beginning, together with the improvements thereon and the rights and privileges thereto appertaining, in which plaintiff claims a fee-simple, and of which the plaintiff was lawfully possessed on the first day of January, 1894, when the defendant entered the same and unlawfully ejected the plaintiff therefrom and unlawfully detains the same from the plaintiff; and the plaintiff made due demand upon the defendant for the possession of said real estate and premises and does hereby renew such demand, which the defendant refused and still refuses to give, and the plaintiff claims the possession thereof, with the appurtenances, besides the cost of this suit.

B. F. LEIGHTON,
*Attorney for Plaintiff.*

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, Plaintiff,
*vs.*
EDWARD M. WILLIS, Defendant.
} At Law. No.—.

Service of a copy of the above declaration is this 5th day of October, 1894, acknowledged.

CALDERON CARLISLE,
*Attorney for Defendant.*

*Statement of Fact, etc.*

Filed November 17, 1894.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY
*vs.*
EDWARD M. WILLIS. } At Law. No. 36903.

SAME
*vs.*
WILLIAM G. JOHNSON. } At Law. No. 36904.

The plaintiff and defendants in the above-entitled causes hereby mutually agree that the said causes may be tried together, and that the material facts in the said causes are as follows, to wit:

26 The plaintiff is a body corporate, organized and doing business under and by virtue of a special charter granted by the legislature of the State of Maine, and having its principal place of business in the city of Bangor, in said State.

An exemplified copy of said charter is filed herewith, marked "E. T. and B. Co., Exhibit No. 1," and is to be read and considered in connection herewith and as part hereof. The defendant William G. Johnson is sued as assignee of the American Ice Company, as hereinafter set out, and the defendant Edward M. Willis as the tenant or lessee of the said Johnson. The American Ice Company is a body corporate duly organized under the laws of the State of Maine and had, until the 14th day of October, 1893, its principal place of business at the said city of Bangor, in said State, since which time it has had no office.

That heretofore, to wit, on the second day of December, A. D. 1889, the said American Ice Company executed and delivered to the said trust company a certain deed, which was recorded in Liber No. 1439, folio 417 *et seq.*, one of the land records of said District, and a regularly certified copy of said deed as recorded is filed with this statement of fact, marked "E. T. and B. Co., Exhibit No. 2," and is made a part hereof as fully as though incorporated herein *in hæc verba*. The original deed bears the impress of the corporate seal of the American Ice Company and of the Eastern Trust and Banking Company upon or near the names of said companies subscribed to said deed, and it is admitted that said seals were affixed to said deed at the time of or before the execution and delivery thereof and as required by the witnessing clause thereto, and that the recorder failed to note the same upon the record.

The bonds described in said deed were executed and delivered unto the said Eastern Trust and Banking Company, as recited in said deed, and were by the said Eastern Trust and Banking Company delivered to the parties entitled thereto, as required by the terms and provisions of said deed. That said bonds were taken by the parties to whom they were delivered for value in the regular

course of business, before maturity, and are now held and owned by them or by their assigns or legal representatives, except as to the first instalment thereof, which fell due in December, A. D. 1892, and was paid, together with the interest then accrued and due on all of said bonds. The next -stalment of said bonded indebtedness, which became due in December, 1893, was not paid at maturity nor was the interest then falling due paid, nor have either of said sums or any part of them been since paid or satisfied in any manner. The parties holding said bonds have not nor have any of them waived their right to said payment in accordance with the tenor and effect of said bonds and of said deed of trust or mortgage. By the terms and provisions of said bonds and of the said deed of trust or mortgage the residue of said bonded indebtedness, to wit, the sum of $35,000, together with the accrued interest thereon, are now and were at the time of the commencement of this suit due and payable.

27 Thereafter, to wit, on or about the 13th day of October, A. D. 1893, the said American Ice Company, by an instrument of writing of that date, made and delivered in due form of law an assignment of all of its property of what kind soever for the benefit of its creditors unto the defendant William G. Johnson, which said deed of assignment was duly made of record in Book No. 1847, page 211 *et seq.*, one of the land records of said District, a duly certified copy of which is filed with this statement of fact, marked "E. T. and B. Co., Exhibit No. 3," and is to be read and considered in connection herewith and as part hereof so far as it may be material.

The said Johnson accepted said trust and entered upon the discharge thereof, in the course of which he, as such assignee, leased the hereinbefore-described real estate unto the defendant, Edward M. Willis. A copy of said lease is filed herewith, marked "E. T. and B. Co., Exhibit No. 4," and is to be read and considered in connection herewith and as part hereof.

After the default in the payment of said second instalment of bonds and of the interest on the bonded indebtedness, as aforesaid, had continued for the period of more than ninety days the said bondholders, or those holding more than fifty per cent. of the total face value thereof, directed the said trustee to proceed in the execution of said trust in accordance with the terms and provisions thereof, in pursuance of which the said trustee has instituted these proceedings to obtain possession of said property.

The said trustee caused a thirty days' notice to quit to be served upon each of said defendants. The notice to William G. Johnson was in the language following, to wit:

"SIR: You are hereby notified to remove from and quit the land and premises situate in the city of Washington, in the District of Columbia, described as follows, viz: All that piece or parcel of land opposite square two hundred and seventy (270), commencing for the same at the southeast corner of said square two hundred and seventy (270), thence southerly with the west line of Thirteenth

street to the channel of the Potomac river; thence westerly with the said channel to a point opposite the southwest corner of said square; thence due north to the southwest corner of said square, following the eastern line of what is alleged to be Thirteen-and-a-half street; thence with the southern line of said square two hundred and fifty-five (255) feet one (1) inch to the place of beginning, together with the improvements thereon and the rights and privileges thereunto appertaining, which you now occupy as tenant by sufferance of the undersigned, in your capacity as assignee as aforesaid, at the end of thirty (30) days from the time of the serving of this notice upon you.

(Signed) EASTERN TRUST AND BANKING COMPANY,
*A Corporation Duly Established under a Charter Granted by the State of Maine,*
By B. F. LEIGHTON, *Its Attorney.*"

28 The notice addressed to Edward M. Willis is the same in every particular, except that the words "in your capacity as assignee as aforesaid" are omitted.

Copies of said notices are filed herewith, marked "E. T. and B. Co., Exhibits Nos. 5 and 6," and the same are to be read and considered as a part hereof. The said notices were duly served upon the defendants on the 30th day of July, A. D. 1894. Thereafter, to wit, on the 17th day of September, 1894, the plaintiffs caused a seven days' summons to be issued by Lewis I. O'Neal, a justice of the peace in and for said District, in accordance with the provisions of the statute in such cases made and provided; and the defendants appeared therein and interposed pleas of title, the defendant Johnson pleading title in himself and the defendant Willis in the said Johnson, whereupon security was given as required by law and the causes were duly certified by the justice to this court for trial, as will appear by the pleadings and proceedings had and taken in said causes.

It is further admitted that after default had been made in the payment of said bonds and the interest thereon, as hereinafter stated, and in pursuance of the direction of the holders of said bonds as aforesaid and of the powers conferred upon and vested in it by said deed of trust or mortgage, the said trustee advertised said property for sale in accordance with the requirements of said deed of trust and exposed the same for sale at public auction in the said city of Bangor, State of Maine, on or about the 4th day of May, A. D. 1894. No sale took place at that time, but the sale was adjourned until September 8th, A. D. 1894, at the same place, at which sale a committee, acting for said bondholders, purchased the above-described real estate for their, the said bondholders', benefit.

The terms of said sale have not yet been complied with and no deed has been made to said purchasers, it being understood and agreed upon between the purchaser and the trustee at the time of said last-named sale that the said trustee should first obtain possession of said property.

Upon the pleadings and proceedings in said causes and the facts hereinbefore stated and admitted, it is by the respective parties to said causes stipulated and agreed that the same shall be, and they hereby are, submitted to the honorable justice holding this court for his determination without a jury, judgment to be rendered by him as to law and justice shall appertain, the right of excepting to the materiality or relevancy or competency of the facts above stated or any of them being reserved, as also the right of appeal.

In witness whereof the said plaintiff and defendant- have, by their respective attorneys, signed this agreement.

B. F. LEIGHTON,
*Attorney for Plaintiff.*
W. G. JOHNSON,
*Attorney for Defendants.*

29 E. T. & B. Co., EXHIBIT No. 1.

Filed November 17, 1894.

STATE OF MAINE.

In the year of our Lord one thousand eight hundred and eighty-seven.

An act to incorporate the Eastern Trust and Banking Company.

Be it enacted by the senate and house of representatives in legislature assembled, as follows:

SECTION 1. Weston F. Milliken, Thomas J. Stewart, Fred. W. Hill, John Cassidy, David Bugbee, Eugene M. Hersey, John H. Dole, Sprague Adams, James Adams, Josiah C. Towle, William B. Dole, J. Albert Dole, William B. Snow, Julius Waterman, Charles E. Field, Eugene C. Nichols, Frank P. Wood, Jacob Sterns, George H. Grant, Ivory W. Coombs, John Ross, John McCann, Cornelius Murphy, David T. Sanders and Francis H. Clergue, or such of them as may by vote accept this charter, with their associates, successors and assigns, are hereby made a body corporate and politic, to be known as Eastern Trust and Banking Company and as such shall be possessed of all the powers, privileges and immunities, and subject to all the duties and obligations conferred on corporations by law, except as otherwise provided herein.

SECTION 2. The corporation hereby created shall be located at Bangor, Penobscot county, Maine, and may establish agencies in any part of this State.

SECTION 3. The purposes of said corporation and the business which it may perform, are; first, to receive on deposit, money, coin, bank notes, evidences of debt, accounts of individuals, companies, corporations, municipalities and States, allowing interest thereon, if agreed, or as the by-laws of said corporation may provide; second to borrow money, to loan money on credits or real estate or personal security, and to negotiate loans and sales for others; to guarantee the payment of the principal and interest of all obli-

gations secured by mortgages of real estate running to said Eastern Trust and Banking Company; to issue its own bonds or obligations based upon real or personal property conveyed to it, in trust to secure the payment of such bonds or obligations and the interest thereon; third, to hold for safe keeping, all kinds of personal or mixed property, and to act as agent for the owners thereof, and of real estate for the collection of income on the same, and for sale of same, and to act as agent for issuing, registering and countersigning certificates, bonds, stocks and all evidences of debt or ownership in property; fourth, to hold by grant, assignment, transfer, devise or bequest, any real or personal property, or trusts duly created, and to execute trusts of every description; fifth, to act as assignee, receiver, guardian, executor and administrator, and no surety shall be necessary upon the bond of the corporation unless the court or officer approving such bond shall require it; sixth, to hold and enjoy all such estates, real, personal and mixed, as may be obtained by the investment of its capital stock or any other moneys and funds that may come into its possession in the course of its business and dealings, and the same sell, grant, mortgage and dispose of, except as provided in section ten; seventh, to do in general, all the business that may lawfully be done by a trust or banking company.

SECTION 4. An administrator, assignee, guardian or trustee, any court of law or equity, including courts of probate and insolvency, officers and treasurers of towns, cities, counties and savings banks of the State of Maine, may deposit any moneys, bonds, stocks, evidences of debt or of ownership in property, or any personal property, with said corporation, and any of said courts may direct any person deriving authority from them, to so deposit the same.

SECTION 5. The capital stock of said corporation shall be one hundred thousand dollars, divided into shares of one hundred dollars each, with the right to increase said capital at any time, by vote of the shareholders, to any amount not exceeding one million of dollars. Said corporation shall not commence business until stock to the amount of one hundred thousand dollars shall have been subscribed for and paid in.

SECTION 6. The shareholders of this corporation shall be individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of said corporation to a sum equal to the amount of the par value of the shares owned by each, in addition to the amount invested in said shares.

SECTION 7. Said corporation, after beginning to receive deposits, shall at all times have on hand in lawful money, as a reserve, not less than twenty-five per cent. of the aggregate amount of its deposits, which are subject to withdrawal on demand; provided, that in lieu of lawful money, two-thirds of said twenty-five per cent. may consist of balances payable on demand, due from any national or State bank.

SECTION 8. The shares of said corporation shall be subject to taxation in the same manner and amount, as are the shares of national banks.

SECTION 9. Said corporation shall be subject to examination by the bank examiner, who shall visit it at least once in every year, and as much oftener as he may deem expedient. At such visits, he shall have free access to its vaults, books and papers, and shall thoroughly inspect and examine all the affairs of said corporation, and make such inquiries as may be necessary to ascertain its condition and ability to fulfill all its engagements. He shall preserve, in a permanent form, a full record of his proceedings, including a statement of the condition of said corporation. A copy of such statement shall be published by said corporation immediately after the annual examination of the same, in some newspaper published in Bangor.

SECTION 10. All property or money held in trust by this
31 corporation shall constitute a special deposit, and the accounts thereof, and of said trust department, shall be kept separate, and such funds and the investment or loans of them shall be especially appropriated to the security and payment of such deposits, and not be subject to any other liabilities of the corporation; and for the purpose of securing the observance of this proviso, said corporation shall have a trust department in which all business pertaining to such trust property, shall be kept separate and distinct from its general business.

SECTION 11. All the corporate powers of this corporation shall be exercised by a board of trustees, whose number and term of office shall be determined by vote of the shareholders at the first meeting held by the incorporators and at each annual meeting thereafter. The affairs and powers of the corporation may, at the option of the shareholders, be entrusted to an executive board of five members, to be, by vote of the shareholders, elected from the full board of trustees. A majority of said board shall reside in this State.

SECTION 12. This act shall take effect when approved.

IN HOUSE OF REPRESENTATIVES, *March* 8, 1887.

This bill, having had three several readings, passed to be enacted.

A. P. WISWELL,
*Speaker pro Tem.*

IN SENATE, *March 9th*, 1887.

This bill, having had two several readings, passed to be enacted.

SEBASTIAN S. MARBLE, *President.*

MARCH 10TH, 1887.

Approved.

JOSEPH R. BODWELL, *Governor.*

STATE OF MAINE,
OFFICE OF SECRETARY OF STATE.

I hereby certify that the paper to which this is attached is a true copy from the records of this office.

[SEAL.] In testimony whereof I have caused the seal of the State to be hereunto affixed.

Given under my hand, at Augusta, this nineteenth day of October, in the year of our Lord one thousand eight hundred and ninety-four, and in the one hundred and eighteenth year of the Independence of the United States of America.

S. J. CHADBOURNE,
*Deputy Secretary of State.*

32 E. T. & B. Co., Exhibit No. 2.

Filed November 17, 1894. Rec'd Jan. 13, 1890—10.15 a. m.

American Ice Company
to
Eastern Trust & Banking Co., Tr. } Trust Mortgage.

Liber No. 1439, folio 417 *et seq.* F. J. J.

This indenture made the second day of December A. D. 1889 between American Ice Company a corporation duly organized under the laws of the State of Maine, and located at Bangor in the county of Penobscot and State aforesaid, party of the first part, and the Eastern Trust and Banking Company, trustee, a corporation duly established under a charter granted by the State aforesaid, and located at Bangor aforesaid, hereinafter called the trust company, party of the second part, witnesseth,

That whereas said American Ice Company, at a meeting of its directors duly called and held on the 18th day of November 1889, for the purpose as expressed in the call of providing for the issue of the first-mortgage bonds of the company to the amount and on the terms expressed in the vote copied below, the language of the proposed vote being embodied in the call, adopted the following vote: "That the president and secretary be authorized to make and execute a mortgage of all the property of the company including that to be purchased of E. M. Willis to any person or corporation as trustee to secure an issue of the coupon notes or bonds of the company to a total amount of forty thousand dollars ($40,000). Said notes or bonds and the interest thereon shall be of such denominations, and payable at such times and places and on such terms and conditions as the president and secretary may determine, the said officers are hereby authorized to do all things and execute all papers necessary for carrying out the purposes of this vote. And whereas in pursuance of said vote the American Ice Company acting by its president and secretary, has made its coupon notes or bonds numbered from one to one hundred and seventy-six inclusive, one hundred and twenty of the same being for one hundred dollars each, and fifty-six for the sum of five hundred dollars each, dated December 2nd, 1889, and payable in equal installments of five thousand dollars ($5,000) each in 3, 4, 5, 6, 7, 8, 9 and 10 years from the first day of December 1889, with interest at the rate of six (6) per cent. per annum payable semi-annually on the first days of June and December in each year at the office of said Eastern Trust and

Banking Company in said Bangor, according to the tenor of the coupons attached thereto, all of which bonds are now in the hands of the party of the second part to be authenticated by *b*a certificate signed by it as being secured by these presents and are held by it for delivery to the parties respectively entitled thereto, the form of each bond, of the coupons, and of the trustees' certificate thereon being substantially as follows, viz:

33 $—. UNITED STATES OF AMERICA. No. —.

*American Ice Company First-mortgage 6 per Cent. Bond. Organized under the laws of Maine.*

Authorized issue, $40,000.

American Ice Company organized under the laws of the State of Maine, and having places of business in the city of Bangor, in the county of Penobscot and State *b* of Maine, and the city of Wash-ington in the District of Columbia, promises to pay Eastern Trust and Banking Company or the bearer hereof the sum of — hundred dollars lawful money of the United States at the office of Eastern Trust and Banking Company in the city of Bangor, Maine, in — years from the first day of December, A. D. 1889, with interest on said sum at the rate of six (6) per cent. per annum, payable semi-annually on the first days of June and December in each year at the office of said Eastern Trust and Banking Company in said Bangor, according to the tenor of the coupons hereto attached upon the presentation and surrender of said coupons respectively. This bond is one of a series of one hundred and seventy-six bonds (176) fifty-six (56) of which are for five hundred dollars each and one hundred and twenty (120) for one hundred dollars each, amounting in the aggregate to forty thousand dollars, numbered respectively from one to one hundred and seventy-six both inclusive, all bearing even date herewith, executed and delivered in pursuance of a vote of the directors of said American Ice Company, duly authorized by the by-laws of said American Ice Company duly adopted on the eighteenth day of November, 1889, authorizing the issue of said bonds and the execution and delivery of the mortgage hereinafter mentioned. Payment of this bond and of the coupons attached is secured in the manner and upon the terms therein stated by a first mortgage upon all the real estate wharves, ice-houses, stables, boilers, elevator and machinery situated in the town of Hampden in the county of Penobscot and State of Maine, and in the city of Wash-ington, District of Columbia, bearing even date herewith, executed and delivered by it in pursuance of said vote to said Eastern Trust and Banking Company as trustee for the bondholders, which mort-gage has been duly recorded in the registry of deeds for Penobscot county, Maine, and in the registry of land records for District of Columbia. Said mortgage is hereby referred to and the terms thereof made a part of this bond. This bond shall pass by deliv-ery. In testimony whereof, said American Ice Company has caused

this bond to be signed and sealed in its name and behalf by its president and countersigned by its secretary, and the coupons hereto attached to be signed by its secretary the second day of December, A. D. 1889.

AMERICAN ICE COMPANY.
—— ——, *Secretary.*
—— ——, *President.*

34 On the back of the bond appears the following endorsement:

*Trustee's Certificate.*

The undersigned trustee, named in the within bond and in the mortgage therein referred to, certifies that said mortgage has been delivered to it as trustees and that this bond is one of the series of one hundred and seventy-six (176) bonds secured thereby.

EASTERN TRUST AND BANKING COMPANY,
By —— ——, *Trustee.*

No. —.

*American Ice Company First-mortgage 6 % Bond.*

Interest payable June 1st and December 1st at the office of Eastern Trust and Banking Company, Bangor, Maine.

All the coupons contain the following:

$—.

On the first day of ——, 18—, American Ice Company promises to pay the bearer — dollars on presentation of this coupon at the office of Eastern Trust and Banking Company, Bangor, Maine, being six months' interest on bond No. —.

Dated December 2nd, 1889.

CHAS. E. FIELD, *Secretary.*

Now then the party of the first part, in consideration of the premises and of the sum of one dollar paid by the party of the second part, receipt whereof is hereby acknowledged, and in order to secure due and punctual payment of said several bonds and of the interest thereon, has given, granted, bargained, sold, transferred and conveyed and does by these presents give, grant, bargain, sell, transfer and convey unto the party of the second part, trustee, as hereinafter provided and its successors in trust, with full power of succession to, and enjoyment of the franchises of the corporation, all its real estate, wharves, ice-houses, boarding-house, stables, boilers, elevator and machinery situated in the town of Hampden in said county of Penobscot and in the city of Washington in the District of Columbia, together with all and singular the privileges and appurtenances thereto belonging. It is understood that all the bonds authorized by the vote herein recited and secured by this instru-

ment shall be delivered to the Eastern Trust and Banking Company as trustee, and by it certified to be of the series secured hereby and that all said bond- shall then be returned to and be at the disposition of said American Ice Company. The description of the real estate and rights owned by the American Ice Company which are herein conveyed is as follows, viz: Two certain lots or parcels of land in Hampden in the county of Penobscot aforesaid bounded and described as follows: That portion of the Cyrus
35 Emery farm which lies between the Penobscot river and the New county road, being all of said farm lying east of said road, the same measuring nine hundred and sixty (960) feet more or less on said road, and containing thirty (30) acres more or less; and being the same premises conveyed by trustees by said Cyrus Emery's estate by said deed recorded in Penobscot Registry of Deeds vol. 502 page 288, to which deed as well as to a deed from Augustus J. Emery recorded in said Registry of Deeds vol. 530 page 98 reference is hereby had. A lot formerly a part of the homestead of John Harden described and bounded as follows, viz: Beginning at a stake, on the deviding line between land of said Harden and land formerly of the heirs of Cyrus Emery, thence at right angles with said dividing line twelve and one-half rods more or less to the dividing line between land of said Harden and land of Doddwell; thence on said dividing line to the Penobscot river; thence down said river to said dividing line between land of said Harden and land formerly of the heirs of Cyrus Emery; thence on said Emery's line to the place of beginning. Together with all the buildings and fixtures of the two said above-described parcels of land, being the same premises conveyed by the Penobscot River Ice Company to said American Ice Company by deed dated June 10th, 1889 and recorded in the Penobscot Registry of Deeds, Book 593, page 449. Also all that piece or parcel of land with the improvements thereon lying in the city of Washington, in the District of Columbia, and being opposite square 270 in said city and District, commencing for the same at the southeast corner of square numbered two hundred and seventy, running thence southerly with the west line of Thirteenth street to the channel of the Potomac river, thence westerly with the said channel to a point opposite the southwest corner of said square numbered two hundred and seventy, thence due north to the said southwest corner of said square two hundred and seventy, following the eastern line of what is alleged to be Thirteen-and-a-half street, thence with the southern line of said square two hundred and seventy, two hundred and fifty-five feet one inch to the place of beginning; together with all the improvements, ways, easements, rights, privileges and appurtenances to the same belonging or in anywise appertaining, and all the remainders, reversions, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand, either at law or in equity, or otherwise however, of the said parties of the first part of, in, to or out of the said piece or parcel of ground and premises. Being the same premises conveyed by E. M. Willis and another to said American Ice Company by indenture dated December second, 1889, and

recorded in land records of the District of Columbia Book 1445 page 16. Together with all the rights and easements, appurtenant-, privileges or options, in the matters of wharving or other riparian rights of any kind whatsoever which may hereafter be acquired by said American Ice Company by virtue of the covenants and agreements in said deed of said Willis & *al.* contained. To have and to hold the above-described property, real estate, rights, and
36 franchises with all the privileges and appurtenances thereto belonging unto the party of the second part, its successors and assigns, to its and their own use and behoof forever, but in trust nevertheless for the equal *pro rata* benefit and security of the holders of the above-mentioned bonds, at whatever period the same may be issued without any preference or priority of one bond over another and for the uses and purposes hereinafter declared.

Article 1. Until default shall be made in the payment of the principal or interest of said bond- or some of them, or in the maintenance of insurance, or in the payment of taxes or assessments as herein provided, or until default shall be made in respect to something by these presents required to be done by said party of the first part, the American Ice Company shall be permitted and suffered to possess, manage, develop, operate and enjoy the plant and property herein conveyed and intended so to be and to take and use the income, rents, issues and profits thereof in the same manner, to the same extent, and with the same effect as if this deed had not been made.

Article 2. If said American Ice Company shall well and faithfully pay the principal sum due on said bonds when the same become payable according to the tenor thereof, together with the interest accrued and due thereon, and shall pay all the coupons attached to said bond- and each of them according to the tenor thereof on the presentation of the said coupons respectively and shall well and truly perform, according to the true intent and meaning hereof all the other things required by these presents to be done by said American Ice Company, then these presents shall be void, but if default shall be made by said American Ice Company in the payment of said bonds or any of them at the time they fall due and payable, or if said American Ice Company shall fail to pay said coupons or any of them according to the tenor thereof on the presentation and surrender of the same respectively, or if it shall fail faithfully to observe the requirements made of it by these presents and such default shall continue for the space of ninety days, then the whole amount of the principal of said bonds, together with all accrued and unpaid interest thereon (unless such default be waived by the holders of the majority of the bonds then outstanding as hereinafter provided) shall be deemed immediately due and payable; and it shall be lawful for the trustee to enter into or upon the premises and property hereby granted or intended so to be and to take possession of the whole or any part thereof and to sell and dispose of all and singular the premises, property, rights, interests and franchises hereby conveyed or mortgaged, or intended so to be, or such portion as the trustee may deem necessary at public auction

in said Bangor upon such terms as to credit, partial credit and security for payment as it may think proper or expedient having first given public notice of the time and place of the sale or sales by advertisement printed not less than once a week for at least four successive weeks in one or more newspapers printed and published in said Bangor and also in Washington aforesaid. The trustee shall have the right to adjourn such sale or sales from time to time in its discretion giving reasonable notice
37 of each adjournment and after so adjourning to make the sale at the time and place to which the same may be adjourned; and no other notice or demand whatsoever to or upon the party of the first part shall be necessary. The trustee is hereby further authorized and empowered in its own name or in the name of the American Ice Company to make, execute, acknowledge and deliver to the purchaser or purchasers at such sale a good and sufficient deed or deeds of conveyance of the property so sold; and any sale made as aforesaid shall be a perpetual bar both at law and in equity against the*w* American Ice Company and all persons claiming by, through, or under it from claiming the property, rights, interest and franchises so sold or any interest therein. And for the purposes aforesaid the party of the second part and its successors in the trust are hereby constituted irrevocably the attorney of said American Ice Company. Out of the proceeds arising from such sale or sales the trustee shall first defray the expenses thereof, together with its just and lawful charges for services and expenses, including reasonable allowance for attorney and counsel fees and also all advances and expenses reasonably incurred by the trustee in operating, maintaining, or managing the property or business of the American Ice Company while in possession and all payments made by said trustee for taxes, assessments, insurance and other proper charges upon said premises and property. The balance of said proceeds shall be paid over ratably to and amongst the parties holding said bonds and coupons so far as any be necessary to pay the amounts then due upon the same including the principal and interest*ed* computed to the time of making the payment; and if any of said proceeds then remain, the remainder shall be paid over to said American Ice Company or its assigns. It is hereby declared and agreed that the receipt of the trustee shall be a sufficient discharge to the purchaser or purchasers for his or their purchase-money; and that the bondholders or any number of them or any person in their behalf may purchase at any sale made as aforesaid.

Article 3. The foregoing provision for a sale under the power aforesaid is cumulative with the ordinary remedy of foreclosure by entry or suit therefor, and the trustee hereunder may upon default being made as aforesaid, institute and carry out proceedings to foreclose this mortgage or deed of trust by suit or otherwise in such manner as may be authorized by law for the foreclosure of mortgages of real estate. And the American Ice Company hereby waives any and all rights of sale or redemption now or hereafter provided by the statutes of Maine or of the United States.

Article 4. Before proceeding to foreclose this deed or mortgage

whether by sale under said power or otherwise the trustee shall have to right first to exact from the bondholders reasonable indemnity against loss and liability that may be incurred by it in so doing and upon the tender by the bondholders or any of them of such reasonable indemnity, whether previously requested of them, or not, it shall be the duty of the trustee in case of any default continuing on the part of said American Ice Company and not
38 waived as hereinafter provided, to foreclose in such lawful manner as the trustee may deem best.

Article 5. No delay or omission by the trustee in exercising the rights and powers herein granted shall be held to exhaust or impair such rights and powers or be construed as a waiver thereof, but it is hereby mutually agreed that the holders of a majority in amount of the bonds at the time outstanding may by and instrument in writing at any time, whether before or after the institution of foreclosure proceedings, waive, or instruct the trustee to waive any default provided always that no such act on the part of the bondholders shall extend to or be taken to effect any subsequent default, or impair the rights resulting therefrom.

Article 6. The American Ice Company agrees at all times upon request to furnish the trustee a schedule showing with reasonable detail the items of the estate, property and other things covered by the lien hereof or intended so to be; and the trustee shall have the power from time to time to release from the lien of this deed any of the property when in its judgment other property of equal value is substituted therefor and subjected to the lien hereof so that such release shall not injure the security or rights of the bondholders.

Article 7. The American Ice Company hereby expressly covenants and agrees to pay any and all taxes, assessments, and governmental charges assessed or laid upon the property herein conveyed or intended so to be and also to keep said premises and property at all times insured in such insurance companies as may be approved by the trustee in such amounts as shall reasonably protect all the insurable property payable in case of loss to the trustee as its interest may appear. In case of loss the insurance money may be applied by the trustee toward the renewal of, or additions to the property destroyed or injured, or at the option of the trustee the money may either be retained and invested in such securities as it approves, as a sinking fund for the redemption of the bonds when due, or be applied to the payment of the principal of such of the aforesaid bonds as may be at the time due and unpaid and of the interest which may at that time have accrued upon the principal and be unpaid, without discrimination or preference; and ratably to the aggregate amount of said unpaid principal and accrued and unpaid interest, rendering the surplus if any to the American Ice Company or to whomsoever may be, lawfully and equitably entitled to receive the same.

Article 8. The trustee shall not be liable for any neglect, mismanagement, or misfeasance or any of its or their agents, attorneys, or servants in relation to taking possession of, controlling, operating,

managing, or selling the premises or property aforesaid when said agents and servants have been selected with reasonable care.

Article 9. The American Ice Company agrees hereafter from time to time during the existence of this trust and mortgage to make, execute, acknowledge, and deliver all such further instruments and conveyances as in the opinion of the legal counsel of the trustee may be necessary to facilitate the execution of said trust or
39 further to secure the rights and remedies of the holders of said bond.

Article 10. The word "trustee" as employed in this instrument shall be taken to mean the trustee hereunder for the time being whether said party of the second part or its successor or successors in said trust.

Article 11. The party of the first part as the agent of the party of the second part shall forthwith cause this indenture to be recorded as a mortgage both of real estate and personal property as may be required by the laws of the State of Maine and of the District of Columbia, so as to preserve and protect the rights of the bondholders and all parties hereto.

In testimony whereof the said American Ice Company has caused these presents and a duplicate hereof to be signed in its name and behalf and its corporate seal to be affixed to this and said duplicate by Francis H. Clergue, its president and Charles E. Field, its secretary, and the said Eastern Trust and Banking Company has caused these presents and said duplicate to be signed in its name and behalf and its corporate seal to be affixed hereto and to said duplicate by George B. Cauney its secretary, the day and year first above written.

AMERICAN ICE COMPANY,
By FRANCIS H. CLERGUE, *President.*
CHAS. E. FIELD, *Secretary.*
EASTERN TRUST AND BANKING COMPANY,
By GEO. B. CAUNEY, *Sec'y.*

Signed, sealed, & delivered in presence of—
J. R. MASON.

STATE OF MAINE, }
*Penobscot,* } ss:

DECEMBER 31ST, 1889.

I, John R. Mason, a notary public in and for the county aforesaid, do hereby certify that Francis H. Clergue, president of the American Ice Company, and Charles E. Field, secretary of said company, who executed in behalf of said company a certain deed bearing date on the second day of December, A. D. 1889, and hereto annexed, personally appeared before me in said county, both being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be the free act and deed of themselves and of said corporation.

Given under my hand and notarial seal this thirty-first day of December, A. D. 1889.

[NOTARIAL SEAL.] JOHN R. MASON,
*Notary Public.*

STATE OF MAINE, *Penobscot*, } ss:

I, Charles F. Sweet, clerk of all the judicial courts in said county, certify that John R. Mason, Esquire, is and was at the date of his certificate an acting notary public in and for said county, duly commissioned and qualified to act as such, and that the signature to the paper annexed, purporting to be his, is genuine, and that he is duly authorized and empowered by the laws of said State to administer oaths, to take depositions, acknowledgments of deeds, assignments, and powers of attorney, and that the annexed instrument is executed and acknowledged according to the laws of this State.

In testimony whereof I have hereunto set my hand and affixed the seal of the supreme judicial court for said State this tenth day of January, in the year of our Lord one thousand eight hundred and ninety.

CHAS. T. SWEET, *Clerk.* [COURT SEAL.]

Indorsement.

Fee, $7.00.

This is to certify that the within is a true and verified copy of an instrument as recorded in Liber No. 1439, vol. 417 *et seq.*, one of the land records of the District of Columbia.

Office of the recorder of deeds, Washington, D. C., September 21, 1894.

[SEAL.] GEO. F. SCHAYER,
*Dep. Recorder of Deeds.*

Copy.

E. T. & B. Co., EXHIBIT No. 4.

Filed November 17, 1894.

This agreement, made this twenty-ninth day of January, A. D. 1894, by and between William G. Johnson, assignee of the American Ice Company, of the city of Washington, District of Columbia, of the first part, and Edward M. Willis, of the same place of the second part witnesseth:

That the said William G. Johnson, assignee as aforesaid, under and by virtue of the authority and direction of the supreme court of the District of Columbia, in its order this day passed in the suit of Charles E. Field *vs.* The American Ice Company and others, No. 15063 of the equity docket of said court, in consideration of the rents, covenants and agreements hereinafter mentioned and on the part of the said party of the second part to be paid, observed and

performed, hath let and demised and doth by these presents let and demise unto the said party of the second part all that certain real estate, wharves and improvements in the city of Washington, District of Columbia, known as all the property of the American
41 Ice Company lying southwest of Water streets opposite square numbered two hundred and seventy, with the ice-house and wharf situated thereon and the necessary tools and machinery for the discharging and storing of ice, together with the scales and office furniture for the term of one year, beginning therefor on the twenty-ninth day of January, A. D. 1894, and fully to be complete and ended on January 28th, 1895.

To have and to hold the same unto and to the use of the said party of the second part his executors and administrators, yielding and paying therefor monthly and on the last day of each and every month during the continuance of this agreement the monthly rent of one hundred and thirty dollars to the said party of the first part, his heirs, executors and administrators at his or their place of business No. 344 D street, northwest, Washington, D. C., or wher-soever the said office or place of business for the time being may be.

Provided always, and it is hereby expressly stipulated and agreed, that this lease and all rights of the parties hereunder, shall cease and determine in the event of the eviction by the lawful enforcement of the rights of the first-mortgage bondholders of the said American Ice Company or eviction by the lawful enforcements of the rights, if any, of the Government of the United States, or an actual sale under the direction of the court by said party of the first part of said property or any portion thereof.

And it is further covenanted and agreed that should the said monthly rent or any part thereof be and remain unpaid for and during the space of ten (10) days next after the day whereon the same ought to be paid by the terms hereof, although no demand shall have been made therefor, and which demand is hereby expressly waived, then the said party of the first part, his heirs, executors and administrators shall have the right to enter upon said premises and the party of the second part utterly to put out and expel without any notice of thirty days as provided in section 681 of the Revised Statutes of the United States relating to the District of Columbia or any other notice whatsoever; all notice whatsoever, being by the said party of the second part, hereby expressly waived, and this lease shall thereupon, at the option of the party of the first part cease and determine.

It is also hereby covenanted and agreed by the said party of the second part that he shall not assign this lease nor sublet the said premises without the written consent of the party of the first part had and obtained, and that he, the said party of the second part, will at all times during his continuance in the possession of the said premises acknowledge the title and defend the possession of the said party of the first part, his heirs, executors and administrators, and that he will not acquire or seek to acquire title thereto, nor acknowledge title thereto in any other person without first

surrendering actual possession thereof to the party of the first part his heirs, executors and administrators, except by the written consent of the said party of the first part, his heirs, executors and administrators.

It is further covenanted and agreed that the said party of
42 the second part shall keep the said premises in the same good condition and repair in which they now are, damage by fire, the elements or trespassers and ordinary wear and tear from reasonable and careful use of the same excepted.

It is further stipulated and agreed that the breach by the party of the second part of any of the covenants, agreements, stipulations, or provisions herein contained, shall give the party of the first part the same right of possession and determination of this lease without notice, as is provided in case of non-payment of rent, and no such breach shall be treated as waived unless expressly so waived in writing, and no waiver of one breach shall operate as a waiver of any other breach.

In testimony whereof, the said party of the first part, as assignee, as aforesaid, and the party of the second part, have hereunto set their hands and seals on the day and year first hereinbefore written, in duplicate.

(Signed) ——— ———. [SEAL.]
EDWARD M. WILLIS. [SEAL.]

WEDNESDAY, *December* 19, 1894.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

EASTERN TRUST AND BANKING CO., Plaintiff,
*v.*
EDWARD M. WILLIS, Defendant. } At Law. No. 36903 Appeals 40.

And now come here the plaintiff, by its attorney, Mr. B. F. Leighton, and the defendant, by his attorney, Mr. W. G. Johnson, and submit this case to the court upon an agreed statement of facts, and, the same having been heard and fully understood, the court finds the matters of difference between the parties in favor of the defendant; therefore it is considered that the plaintiff take nothing by its suit, and that the defendant go thereof without day and recover against said plaintiff his costs of defense, to be taxed by the clerk, and have execution thereof.

WEDNESDAY, *December* 19, 1894.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

EASTERN TRUST AND BANKING CO., Plaintiff, *v.* WILLIAM G. JOHNSON, Assignee, Defendant. } At Law. No. 36904, Appeals 41.

And now come here the plaintiff, by its attorney, Mr. B. F. Leighton, and the defendant, by his attorney, Mr. W. G. Johnson, and submit this case to the court upon an agreed statement of facts, and, the same having been heard and fully understood, the
43 court finds the matters of difference between the parties in favor of the defendant; therefore it is considered that the plaintiff take nothing by its suit, and that the defendant go thereof without day and recover against said plaintiff his costs of defense, to be taxed by the clerk, and have execution thereof.

*Notice of Appeal.*

Filed December 22, 1894.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING CO. *vs.* EDWARD M. WILLIS, Defendant. } At Law. No. 36903.

SAME *vs.* WM. G. JOHNSON, Assignee, Def't. } At Law. No. 36904.

The plaintiff appeals from the judgment rendered against it in the above-entitled causes to the Court of Appeals of the District of Columbia.

B. F. LEIGHTON,
*Attorney for Plaintiff.*

In the Supreme Court of the District of Columbia.

| | |
|---|---|
| EASTERN TRUST AND BANKING COMPANY *vs.* EDWARD M. WILLIS and SAME *vs.* WILLIAM G. JOHNSON, Assignee. | At Law. Nos. 36903 and 36904. |

The President of the United States to Edward M. Willis and William G. Johnson, assignee, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia on the 22 day of December, 1894, wherein The "Eastern Trust and Banking Company" is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia. 44

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 22 day of December, in the year of our Lord one thousand eight hundred and ninety-four.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 24 day of December, 1894.

WM. G. JOHNSON,
*Attorney for Appellee.*

(Endorsed:) Nos. 36903, 36904. Law. Eastern Trust and Banking Company *vs.* Edward M. Willis and Wm. G. Johnson, assignee. Citation. Issue Dec. 22, 1894. Served cop- of the within citation on —— ——. —— ——, marshal. B. F. Leighton, attorney for appellant.

*Opinion.*

Filed December 29, 1894.

| | | |
|---|---|---|
| EASTERN TRUST & BANKING CO. *vs.* EDWARD M. WILLIS. | Law. | No. 36903. |
| SAME *vs.* WILLIAM G. JOHNSON. | Law. | No. 36904. |

These cases are identical in fact, save as to the property involved,

and differ as to defendants. They have been submitted upon an agreed statement of facts, applicable to and filed in each case, for the judgment of the court without a jury. They were instituted under what is known as the landlord & tenant act, to recover possession of the realty described in the proceedings, before a justice of the peace, and were certified to this court by the justice upon a plea of title.

In each case the pl'ff claims a fee-simple by the declaration filed in compliance with the rule of court.

By the agreed statement of facts it appears that the rights of the plaintiff are fixed and determined by a deed of trust from the American Ice Co., a copy of which is filed as an exhibit with the statement.

The deed of trust conveys the property in question to the pl'ff to secure the payment of certain bonds described therein, with accruing interest. By it it is provided that the American Ice Co. shall be permitted and suffered to possess, manage, &c., and to take and use the income, rents, &c., until default be made in the payment of the principal or interest of the bonds. It is also provided
45 that upon default made, &c., it shall be lawful for the trustee to enter into the premises & take possession of the whole or any part thereof, and to sell & dispose of all or such portion as the trustee may deem necessary, at public auction, in Bangor, upon terms of sale prescribed.

The statement of facts shows that default was made in the payment of the debt secured by the trust, and that the property in question was advertised for sale by the trustee and was sold Sept. 4, 1894, the purchasers being a committee acting for the bondholders; that the terms of sale have not been complied with, because it had been agreed between the purchasers and trustee that the latter should first obtain possession of the property; that these actions were instituted pursuant to such agreement.

One of the objections urged by the defendants to maintaining these actions is that the pl'ff is a foreign corporation authorized by its charter to conduct its business solely within the State of Maine, and that under the policy of the laws in force in the District of Columbia corporations organized therein were not permitted to exercise the powers of trustee. The charter of the pl'ff, which has been put in evidence, while not containing express authority to transact business out of the State, does not prohibit it, neither did any law in force in the District of Columbia, nor any public policy deduced from general legislation, nor any settled adjudications of the highest courts of this District prohibit the exercise of such powers by a foreign corporation within its limits. Under these circumstances, in harmony with the general law of comity among the States, a foreign corporation may exercise its powers in the District of Columbia.

Bank of Augusta *v.* Earle, 13 Pet., 519.
Runyon *v.* Lessee of Coster *et al.*, 14 Pet., 122.
Cowell *v.* Colo. Springs Co., 100 U. S., 55.
Christian Union *v.* Fount, 101 U. S., 352.

It is also urged as matter of defence that the relation of landlord and tenant did not exist between the pl'ff and def'ts, and that therefore the law did not authorize these actions and the justice of the peace had no jurisdiction of the cause of action.

The Court of Appeals of this District has recently decided that the act of Congress of July 4, 1864, entitled "An act to regulate proceedings in cases between landlord and tenants in the District of Columbia," applied to the case of a purchaser at a sale made by a trustee under an ordinary deed of trust of land as security for debt and grantee of such trustee against the grantor in such deed of trust in possession. That court held that the reservation in the deed of trust of the right of possession to the grantor until default made in the payment of the debt secured operated as *are* demise by the trustee (grantee) to the grantor, and created the relation of landlord & tenant between those parties; that the grantee of the trustee was vested with his rights to the possession and might maintain the action.

Laring *v.* Bartlett, Law Rep., June 21, '94.

46 In the case of Luchs *v.* Jones, 1 MacA., 345, the general term dismissed the appeal for want of jurisdiction, but the justice delivering the opinion of the court held that under like circumstances the grantor in possession after sale made and deed delivered by the trustee to the purchaser became, by operation of law, tenant by sufferance of the purchaser, & that the landlord & tenant act of July 4, 1864, did not require that the relation of landlord & tenant should exist by the convention of the parties in order to give jurisdiction.

That decision has never been regarded as authority, and for nearly twenty years this court, both in special & general term, has uniformly held that unless the conventional relations of landlord & tenant existed between the parties a justice of the peace under that act has no jurisdiction of a question of disputed possession, and it has so ruled in cases like that of Luchs & Jones.

See Jennings & Webb, 20 D. C., 317.

Whether the reasoning of the Court of Appeals be approved or not, its conclusion is authoritative with this court, and to me appears to settle the question of the jurisdiction of the justice of the peace in this case, notwithstanding the fact that in the cases at bar the controversy is between the trustee and the grantor in the trust deed, while the case adjudicated was between the purchaser from the trustee and the grantor in the trust deed.

It is further urged in defence that inasmuch as it appears by the agreed statement of facts that the trustee has executed the trust power to the extent of making the sale and has entered into an agreement with the purchasers to obtain possession for them that these actions cannot be maintained.

Whether the deed of trust contemplates the possession of the trust property by the trustee for the purposes of management upon default made in the payment of the debt need not be determined, for the

trustee has not assumed to exercise such power. It does in terms authorize the trustee to take possession of the property and to sell such portion as it may deem necessary upon default made by the debtor. Such possession is authorized in aid of a sale to be made by the trustee. The power is to take possession and sell. The trust deed also unquestionably confers authority upon the trustee to sell without first taking possession. This power the trustee has exercised; it has made sale.

The right of the purchaser will be perfected upon the execution & delivery of a deed by the trustee, and that is the sole remaining function to be performed by the trustee under the power of sale. No power is given it to take or acquire possession after sale made at the instance or for the convenience of the purchaser. Its powers are limited to those declared in the trust deed. Those powers cannot be enlarged or added to by subsequent convention between it and the purchaser. It is not indicated that possession is sought in its own right, but at the instance of and in order that when acquired it may be turned over forthwith to the purchaser.

It has the title, for it has not yet conveyed, but, under existing circumstances, it has neither the right of property nor the
47 right of possession. These actions cannot be maintained and judgment must be for the defendant in each case.

1895, January 5.—$50.00 deposited in each case in lieu of bond for appeal.

*Stipulation.*

Filed January 7, 1894.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING CO. *vs.* EDWARD M. WILLIS. } At Law. No. 36903.

SAME *vs.* WILLIAM G. JOHNSON, Assignee. } At Law. No. 36904.

The parties to the above-entitled causes, by their respective attorneys, hereby stipulate and agree that the record on appeal to the Court of Appeals of the District of Columbia from the judgment rendered in said causes shall consist of the following, to wit:

1. The complaint before the justice of the peace in No. 36903, the plea thereto, and the declaration filed in said cause. (The complaint, plea, and declaration are the same in No. 36904, the name of the defendant being changed, except as appears in the agreed statement of facts, and are to be considered as if set out *in extenso* on the record.)
2. The agreed statement of facts.
3. The charter of the plaintiff. (Exhibit "E. T. & B. Co. No. 1.")
4. The mortgage or deed of trust in full. ( " " " No. 2.)
5. The lease. ( " " " No. 4.)

6. And the opinion of the court. (The assignment referred to in the agreed statement of facts was made under the act of Congress approved May 24, 1893.)

B. F. LEIGHTON,
*Attorney for Plaintiff.*
WM. G. JOHNSON,
*Attorney for Defendants.*

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 49, inclusive, are true copies of the originals in causes numbered 36903 and 36904, wherein The Eastern Trust and
48 Banking Co. is plaintiff and Edward M. Willis and Wm. G. Johnson are the respective defendants, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 24th day of January, A. D. 1895.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 425. The "Eastern Trust and Banking Company," appellant, *vs.* Edward M. Willis and William G. Johnson, assignee. Court of Appeals, District of Columbia. Filed Jan. 28, 1895. Robert Willett, clerk.

49 *Separate Answer of the Corcoran Fire Insurance Company.*

Filed May 5, 1896.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY *vs.* AMERICAN ICE COMPANY *et al.* } No. 17259. In Equity.

The separate answer of the defendant Corcoran Fire Insurance Company of the District of Columbia to the bill of complaint of the above-named complainant against it and others in chancery exhibited.

1 to 7. This defendant has no knowledge of the matters and things averred in the first, second, third, fourth, fifth, sixth, and seventh paragraphs of the bill, and can neither admit nor deny the same, and, if material, demands strict proof thereof, save that it admits that this defendant is a body corporate, organized under the laws of the United States relating to the District of Columbia, hav-

ing an office in this District and engaged in business as an underwriter of insurance against loss or damage by fire.

8. Answering the eighth paragraph of said bill, this defendant says that it is true that the defendant Johnson obtained from this defendant a policy of insurance against loss by fire to the extent of one thousand dollars upon the frame ice-house located in front of square 270, in the city of Washington, but that it has no knowledge as to the source from which the said Johnson obtained the
50 money with which to pay the premium upon said policy.

9. Answering the ninth paragraph, this defendant says that it is true that the said building was totally destroyed by accidental fire, and that damage thereby resulted, but this defendant cannot state to what extent, as it does not know what interest or title the party insured had in said premises at the time of the said fire; but it denies that the said policy of insurance was in full force and virtue on the 11th of February, 1896, or at any other time, because it says that by the express terms of said policy it is provided as follows:

"II. This policy shall be void in each and every of the following cases, unless otherwise specified or consented to hereon, to wit: * * * 6. If all the liens (whether by mortgage, judgment, or otherwise) on any part of said property are not expressed hereon."

That at the time of the issuing of said policy there was, as this defendant is informed and believes, a valid outstanding deed of trust to secure a considerable indebtedness, whereof this defendant had no notice or knowledge whatsoever, and that by reason thereof the said policy was and is of no effect.

This defendant further says that it has never set up and insisted upon its legal defense to the said policy as against the said Johnson, the party insured thereby, but that it does insist that no legal liability exists, and that any payment made by this defendant by reason of the said policy will be as a matter of grace and
51 favor by this defendant under its policy and not a matter of legal right on the part of any person whomsoever.

This defendant further says that it has no knowledge of the other matters and things in the said bill averred and can neither admit nor deny the same.

Further answering, this defendant says that it did not in and by said policy undertake or agree to insure the said property against loss or damage by fire for the purposes set out in the deed of trust to the complainant referred to in the bill, but that, on the contrary, it had no knowledge whatever of the deed of trust, and that the said policy was made payable to Johnson and was issued by this defendant upon the express understanding that this defendant was insuring the interest of the defendant Johnson as the assignee of the American Ice Company and that interest alone, and that it never had knowledge of the existence of any other interest or claim to said property and never undertook or agreed to insure the same against loss or damage of any kind.

And, having fully answered, this defendant prays to be hence dismissed with its reasonable costs in this behalf sustained.

THE CORCORAN FIRE INS. CO. OF THE DIST. OF COL.,
[SEAL.] By L. R. PEAK, *Sec'y.*

DISTRICT OF COLUMBIA, *ss:*

*I* L. R. Peak, being duly sworn, deposes and says that he is the secretary of the Corcoran Fire Insurance Company of the
52 District of Columbia, whose corporate name is subscribed to the foregoing answer; that he has read the said answer and knows the contents thereof, and that the matters and things therein stated on his personal knowledge are true, and those stated on information and belief he believes to be true.

L. R. PEAK.

Subscribed and sworn to before me this 5th day of May, A. D. 1896.

HARRY C. BIRGE,
[SEAL.] *Notary Public.*

*Joint and Separate Answer of the Defendants American Ice Company and Edward M. Willis.*

Filed October 24, 1896.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY
*vs.*
THE AMERICAN ICE COMPANY *et al.* } No. 17259. In Equity.

The joint and separate answer of the defendants The American Ice Company and Edward M. Willis to the bill of complaint against them and others in chancery exhibited.

1 and 2. These defendants admit the averments of the first and second paragraphs of the bill to be substantially correct,
53 except that they do not admit that the said deed of trust was a valid conveyance in law of the title of the property of the defendant The American Ice Company to the complainant, because they say that they are advised and believe, and therefore aver, that the complainant was not authorized by its charter nor by the laws of the United States in force in this District to take said title for the uses and purposes therein described nor to execute the trusts therein mentioned, but they admit that the said deed constitutes a valid equitable mortgage upon the property of the defendant The American Ice Company for the benefit of the holders of the bonds therein described.

3. Answering the third paragraph, these defendants say that they have no knowledge of the amount of the bonds nor who holds the same, nor how much, if any, of the said indebtedness or the inter-

est thereon remains due and unpaid, and can neither admit nor deny the averments of the said paragraph, and, if material, demand proof thereof.

4. These defendants admit to be substantially true the fourth paragraph of said bill.

5. These defendants have no knowledge as to the averments of the fifth paragraph of the bill as to the directions to the complainant to execute the deed of trust or the execution thereof by the complainant, and can neither admit nor deny the same, but, if material, demand strict proof thereof; but these defendants are informed and believe that the complainant undertook to sell, in the city of Bangor, in the State of Maine, the real estate located in the city of Washington, District of Columbia, belonging to the defendant The American Ice Company and by it conveyed to the
54 defendant William G. Johnson as its assignee in trust for the benefit of all its creditors; that these defendants have no knowledge as to the manner in which the said sale was conducted or who were the alleged purchasers or the price paid therefor, if anything, and that all information with respect thereto has been withheld from these defendants by the complainant, although the assignee of the defendant The American Ice Company, William G. Johnson aforesaid, has requested the agents of the complainant to furnish information with regard thereto; and these defendants are advised and believe, and therefore aver, that the said alleged sale of the real estate located in Washington is invalid and should be set aside.

These defendants have no knowledge of the averments of said paragraph as to the agreement between the purchasers at said sale and the complainant as to the complainant securing possession of the property for such purchasers at such sale and can neither admit nor deny the same, nor can they admit the validity of any such agreement on the part of the complainant, and these defendants are bound to insist that if the purchasers bought the property with notice of any adverse title thereto they are not entitled to the aid of a court of equity to relieve them from the consequences of such a purchase.

The defendants further say that the averments in the said fifth paragraph as to the proceedings before the justice of the peace in this court, in the Court of Appeals, and the Supreme Court of the United States for possession of said property are stated with
55 probable accuracy, but for certainty they prefer to refer to the said proceedings themselves as to their character and the disposition thereof.

6. Answering the sixth paragraph of said bill, these defendants say that they have no knowledge as to the matters and things therein set up and can neither admit nor deny the same, and, if material, they demand strict proof thereof; but they are advised and believe, and therefore charge, that any such agreement as is therein averred to have been made between the complainant and the purchasers was invalid and void.

7. Answering the seventh paragraph of said bill, these defend-

ants admit that the defendant Willis continued in the possession of the said property as the tenant of the defendant William G. Johnson, assignee, until about the eleventh day of February, 1896, when the improvements upon said real estate were totally destroyed by fire, and that the defendant Johnson, assignee, received the rent therefor from the defendant Willis during his occupation thereof. But these defendants, on information and belief, deny that the said defendant Johnson, assignee, is obliged to account to the complainant for said rents, and aver that, even if the complainany should ultimately be adjudged by the Supreme Court of the United States, in the proceedings there pending, to be entitled to the possession of the said premises, the said defendant, Johnson, assignee, would be obliged to account for the said rents in that proceeding or in a suit upon the supersedeas bond therein given, and that he cannot be required to account for the said rents in this proceeding or otherwise to acknowledge the right or title of the complainant to
56 the said premises, because it would be a violation of the supersedeas of the judgment for possession obtained by the complainant on the law side of this court and now pending on writ of error in the Supreme Court of the United States, and that until the final judgment of the Supreme Court of the United States in said case affirming the title of the said real estate to the complainant, the said defendant, Johnson, assignee, cannot be required, in this or any other proceeding, to account to the complainant for the possession or rents of the said real estate.

8. Answering the eighth paragraph of said bill, these defendants say that it is true that the defendant Johnson, assignee, procured policies of insurance for the amount stated in said paragraph from the companies named therein for the purpose, as these defendants are informed and believe, of indemnifying him against loss or damage by fire, but these defendants deny that the said insurance was procured by the said defendant, Johnson, assignee, in pursuance of the said alleged deed of trust to the complainant or of any of the provisions thereof, but, on the contrary, was secured by the said Johnson, as assignee aforesaid, to protect such interests as he, as assignee, might have in the said real estate and for the equal benefit of all the creditors of the defendant The American Ice Company, and not for the benefit of the said bondholders alone.

9. Answering the ninth paragraph of said bill, these defendants say that it is true that on or about the eleventh day of February, 1896, the improvements upon said real estate in this District were totally destroyed by fire; but, on information and belief,
57 they deny that by reason thereof the defendant Johnson, assignee, became entitled to, or the said insurance companies became liable to pay, the amount of indemnity specified in their policies; but, on the contrary, these defendants are informed and believe, and therefore aver, that by the terms of said policies the insurance companies were not bound to pay the said sums to the said defendant, Johnson, assignee, because of the fact of alleged liens upon the title to said property not disclosed to said companies at the time of the taking out of said insurance. But these defendants

are informed and believe, and therefore charge, that the said companies subsequently waived said defense as a matter of grace and favor to the defendant Johnson, assignee, personally, because the said companies became convinced that the said omission to inform them of said alleged liens had been accidental and unintentional on the part of the said defendant, Johnson, assignee; and these defendants are further informed and believe that the said insurance companies have never acknowledged any legal*ly* liability on the said policies, but have always expressly denied the same.

Further answering said paragraph, these defendants say that they are advised and believe that the said defendant, Johnson, assignee, was not obliged to effect insurance upon the said premises for the benefit of the said bondholders, but that the said bondholders claimed to have executed their alleged deed of trust by a sale of the said premises and proceeded for possession thereof, and that the said bondholders had thereby elected to consider the said deed of trust as executed and at an end, and any duties or obligations of the defendant The American Ice Company or its assigns under
58 the said mortgage became at an end, and thereupon it became the obligation of the complainant or the parties secured by the said alleged deed of trust from that time to insure their own interests in said premises, as it was the privilege of the defendant Johnson, assignee, to insure, as he did, such interest as he might have in the said real estate for the benefit of all the creditors of the defendant The American Ice Company under its deed of assignment.

And, further answering said paragraph, these defendants say that they are informed and believe that the said Johnson, assignee, did deny the right of the complainant to receive the said insurance money, but they are likewise informed and believe that the said defendant, Johnson, assignee, never declared his attention of collecting the said insurance money and applying the same to the payment of the claims of the general creditors under the deed of assignment from this defendant, The American Ice Company. On the contrary, these defendants are informed and believe that the only declaration made by the said Johnson, assignee, on the subject of said insurance money was that he would collect the same and hold it until the controversy over that question was judicially determined, asserting his belief to be that the money when collected by him would be legally distributable *pro rata* among all the creditors of this defendant, American Ice Company, including the bondholders; and these defendants deny the right of the complainant to receive the said insurance money or any part thereof.

Further answering said bill, these defendants say that they are informed and believe that since the filing of the bill in this cause the said complainant has consented to the payment of the
59 said money by all said insurance companies to the defendant Johnson, assignee, and that the same has been paid to the said defendant, Johnson, assignee, and that he now holds the same subject to the final adjudication of this court as to the rights of all parties therein.

10. Answering the tenth paragraph of said bill, these defendants

say that they have no knowledge of the matters and things therein set up except as to the proceedings in this court and *and* in the Supreme Court of the United States in the case of The United States *vs.* Morris *et al.*, No. 10306 of the equity dockets of this court, commonly known as "the Potomac Flats case," in which case this court adjudged the title to the real estate in this District, mentioned in the bill herein, to be the property of the United States. These defendants are informed and believe that an appeal to the Supreme Court of the United States has been taken from the said decree and is there pending and undecided, and that the complainant has never taken any steps to maintain its title to the said land in the said proceedings, but has failed and refused, though requested so to do, to contribute to any of the cost of the said litigation or in any way to defend the title thereto, and that the whole cost and labor of said defense has been borne exclusively by the defendant Johnson, assignee.

11. Answering the eleventh paragraph, these defendants deny that it would be to the interest or benefit of the beneficiaries under said deed of trust or of the parties secured under the deed of assignment for any receiver to be appointed by this court, and these defendants deny that there has been in said bill shown any cause to justify this court in taking from the defendant Johnson the
60 property legally vested in him for the benefit of all creditors, and these defendants claim the same benefit of this objection as if they had demurred to the bill therefor.

12. Answering the twelfth paragraph of said bill, these defendants say that they have no knowledge as to any of the matters and things therein set forth, but they deny that the complainant has any right in the present posture of affairs to foreclose the said deed of trust or mortgage which it claims to hold, because they say that the said complainant has already undertaken to foreclose the said trust by a sale of the real estate, and insisted and still insists upon the validity and effect of said foreclosure in the said proceedings for possession now pending in the Supreme Court of the United States, which judgment for possession there pending on writ of error the complainant still insists upon maintaining; and these defendants deny that the complainant has the right to both remedies, having elected to proceed under the other, and that it cannot undertake to foreclose said mortgage by proceedings in a court of equity while still insisting upon the effect and validity of the foreclosure proceedings already attempted, and by which it is claims that the title of the defendant Johnson, assignee, has been entirely extinguished and annulled; and these defendants claim the same benefit of this objection as if they had specially demurred to the bill therefor.

Further answering said bill, these defendants say that they are informed and believe, and therefore aver, that while the deed of assignment to the defendant Johnson, assignee, passed the property of this defendant, The American Ice Company, both in the
61 District of Columbia and the State of Maine, the complainant and the bondholders whom it claims to represent, by proceedings in the State of Maine, defeated the title of the defendant

Johnson, assignee as aforesaid, to any of the property there, and thereby the general creditors of this defendant, The American Ice Company, represented by the defendant Johnson, under said deed of assignment, were wholly debarred from any recourse to the said property in Maine, and the same has been wholly lost to the defendant Johnson, assignee of this defendant, The American Ice Company, and that, as appears in and by the averments in the bill herein, the complainant claims to have enforced its lien upon the said property in Maine to the exclusion of any rights of the general creditors, and that, as the complainant has the right to the recourse to the property there and here and the defendant Johnson, assignee as aforesaid, has recourse only to the property in this jurisdiction, these complainants are advised and believe that the said defendant, Johnson, assignee as aforesaid, is entitled to have the assets marshalled as between him and the complainant, and that the complainant is not entitled to have recourse to the property here until the claims of the general creditors have been satisfied, unless it first surrenders the property in Maine and consents to a resale of the whole property in the interest of all the creditors.

And, having fully answered, these defendants pray to be hence dismissed with their reasonable costs in this behalf.

AMERICAN ICE COMPANY.
E. M. WILLIS, *President.*
E. M. WILLIS.

CALDERON CARLISLE,
*Solicitor for American Ice Co. and*
*E. M. Willis, Defendants.*

62 Edward M. Willis, being first duly sworn, deposes and says that he has read the annexed and foregoing answer by him subscribed for the American Ice Company, as its president, and for himself personally, and that the matters and things therein stated on his personal knowledge are true and those stated on information and belief he believes to be true.

EDWARD M. WILLIS.

Subscribed and sworn to before me this twenty-fourth day of October, 1896.

OSCAR LUCKETT,
[SEAL.] *Notary Public.*

*Separate Answer of the Defendant William G. Johnson, Assignee.*

Filed October 24, 1896.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY
*vs.*
THE AMERICAN ICE COMPANY *et al.*
No 17259. In Equity.

The separate answer of the defendant William G. Johnson, assignee, to the bill of complaint against him and others in chancery exhibited.

63 1 and 2. This defendant admits the averments of the first and second paragraphs of the bill to be substantially correct, except that he does not admit that the said deed of trust was a valid conveyance in law of the title of the property of the American Ice Company to the complainant, because he says that the complainant was not authorized by its charter nor by the laws of the United States in force in this District to take the title for the uses and purposes therein described, nor to execute the trusts therein mentioned, but he admits that the said deed constitutes a valid, equitable mortgage upon the property of the American Ice Company for the benefit of the bondholders therein described.

3. Answering the third paragraph, this defendant says that he has no knowledge as to the amount of the bonds, nor who holds the same, nor how much, if any, of the said indebtedness or the interest thereon remains due and unpaid, and can neither admit nor deny the averments of the said third paragraph, and if material demands proof thereof.

4. This defendant admits to be substantially true the averments of the fourth paragraph of said bill.

5. This defendant has no knowledge as to the averments of the fifth paragraph of the bill as to the default in the deed of trust therein mentioned, or the directions to the complainant to execute the same, or the execution thereof by the complainant, and can therefore neither admit nor deny the same, and if material demands strict proof thereof; but this defendant is informed and believes that the said complainant undertook to sell, in the city of Bangor, in the State of Maine, the real estate located in the
64 city of Washington belonging to the defendant The American Ice Company and by it conveyed to this defendant as its assignee in trust for the benefit of all its creditors; that he has no knowledge as to the manner in which the said sale was conducted, or who were the alleged purchasers or the price paid therefor, if anything, and that all information with respect thereto has been withheld from this defendant by the complainant, although this defendant has requested the agents of the complainant to inform this defendant thereof.

And this defendant is advised and believes, and therefore avers, that the said alleged sale of the real estate in Washington is invalid and should be set aside.

This defendant has no knowledge of the averments in said paragraph as to the agreement between the purchasers at said sale and the complainant as to the complainant's securing possession of the property for such purchasers at such sale, and can neither admit nor deny the same; nor can he admit the validity of any such agreement on the part of the complainant, and is bound to insist that if the purchasers bought the property with notice of any adverse title thereto, they are not entitled to the aid of a court of equity to relieve them from the consequences of such purchase.

This defendant further says that the averments in the said fifth paragraph as to the proceedings before a justice of the peace, in this court, in the Court of Appeals, and in the Supreme Court of the United States for possession of said property are stated with probable accuracy, but that for certainty he prefers to refer to the
65 said proceedings themselves as to their character and the disposition thereof.

6. Answering the sixth paragraph of said bill, this defendant says that he has no knowledge, and if material he demands strict proof thereof; but this defendant is advised and believes, and therefore avers, that any such agreement as is therein charged to have been made between the complainant and the purchasers was invalid and void.

7. Answering the seventh paragraph of said bill, this defendant admits that the said Willis continued in the possession of the said property, as the tenant of this defendant, until about the eleventh day of February, 1896, when the improvements upon the said real estate were totally destroyed by fire, and that this defendant received the rent therefor from said Willis during his occupation thereof; but this defendant denies that he is obliged to account to the complainant therefor, and avers the fact to be that even if the complainant should ultimately be adjudged by the Supreme Court of the United States, in the proceedings therein pending, to be entitled to the possession of said premises, this defendant would be obliged to account for the said rents in that proceeding or in a suit upon the supersedeas bond therein given, and that he cannot be required to account for said rents in this proceeding or otherwise to acknowledge the right or title of the complainant to the said premises, because it would be a violation of the supersedeas of the judgment for possession obtained by the complainant on the law side of this court and now pending on writ of error in the Supreme Court of the United States, and that until the final judgment of the Supreme Court of the United States in said case, affirming the title of
66 the complainant to said real estate, this defendant cannot be required in this or any other proceeding to account to the complainant for the possession or rents of said real estate.

8. Answering the eighth paragraph of said bill, this defendant says that it is true that he procured policies of insurance for the amounts stated in said paragraph from the companies named

therein to indemnify him against loss or damage by fire; but he denies that the same was procured by him in pursuance of the said alleged deed of trust to the complainant or of any of the provisions thereof, but, on the contrary, was secured as assignee to protect such interest as he might have as assignee in the said real estate, and for the equal benefit of all the creditors of the said American Ice Company, and not for the benefit of the said bondholders alone.

9. Answering the ninth paragraph of said bill, this defendant denies that by reason thereof he became entitled to or the said insurance companies became liable to pay the amount of indemnity specified in their policies, and, on the contrary, this defendant avers that by the terms of said policies of insurance the insurance companies were not bound to pay the *the* said sum to this defendant because of the fact of alleged liens upon the said property not being disclosed by this defendant to said companies at the time of the insurance aforesaid; but this defendant avers that the said companies subsequently waived said defense as a matter of grace and favor to this defendant personally, because the said omission to inform them of said liens was found by them to have been accidental and unintentional, and they never did acknowledge any legal liability on the said policies, but expressly denied the same.

67 Further answering the said paragraph, this defendant says that he is advised and believes that he was not obliged to effect insurance upon the said premises for the benefit of the said bondholders, but that the said bondholders claimed to have executed their alleged deed of trust by a sale of the premises and proceeded for possession thereof, and they thereby elected to consider the said deed of trust as executed and at an end, and any duties and obligations of the mortgagor and its assigns thereunder thereby became at an end, and it was the obligation of the complainant or the parties secured under the said alleged deed of trust from that time to insure their own interest in said premises as it became the privilege of this defendant to insure as he did all such interest as he might have in the said real estate for the benefit of all the creditors under the deed of assignment.

And further answering said paragraph, this defendant says that it is true that he denied the right of the complainant to receive the said insurance money, but he expressly denies that he ever declared his intention of collecting the said sums and applying the same to the payment of the claims of the general creditors under said assignment, and, on the contrary, avers the fact to be that the only declaration that he made on the subject was that he would collect the said insurance and hold it until the controversy over that subject was judicially determined, but asserted his belief to be that the money when collected by him would be legally distributable *pro rata* among all the creditors of the American Ice Company, including the bondholders, and he denies the right of the complainant to receive the said money or any part thereof.

68 Further answering said paragraph of said bill, this defendant says that the said complainant has since the filing of its bill consented to the payment of the said money by said in-

surance companies to this defendant, and the same has been paid to him, and he holds the same subject to the final adjudication of this court as to the rights of all parties therein.

10. Answering the tenth paragraph of said bill, this defendant says that he has no knowledge of the matters and things therein set up, except as to the proceedings in this court and in the Supreme Court of the United States in the case of The United States *vs.* Morris *et al.*, No. 10306 of the equity dockets of this court, commonly known as the "Potomac Flats case," in which case this court adjudged the title to the real estate in this District mentioned in the bill to be the property of the United States; that an appeal to the Supreme Court of the United States has been taken from the said decree and is there pending and undecided; and this defendant avers that the complainant has never taken any steps to maintain its title to the said land in the said proceedings, but has failed and refused, though requested so to do, to contribute to any of the cost of the said litigation, or in any way to defend the title thereto, and the whole cost and labor of said defense has been born exclusively by this defendant.

11. Answering the eleventh paragraph, this defendant denies that it would be to the interest of the beneficiaries under the said alleged deed of trust or of the parties secured under the deed of assignment for a receiver to be appointed by this court, and he denies that there has been in said bill shown any cause to justify this court in
69 taking from this defendant the property legally vested in him for the benefit of all creditors, and he claims the same benefit of this objection as if he had demurred to the bill therefor.

12. Answering the twelfth paragraph, this defendant says that he has no knowledge as to any of the matters and things therein set forth, but he denies that the complainant has now the right in the present posture of affairs to foreclose the said deed of trust by a sale of the real estate, and insisted and still insists upon the validity and effect of such foreclosure in the said proceedings for possession now pending in the Supreme Court of the United States, which judgment for possession there pending on writ of error the complainant still insists upon maintaining; and this defendant denies that the complainant has the right to both remedies, having elected to proceed under the other, and that it cannot undertake to foreclose the said mortgage by proceedings in a court of equity while still insisting upon the effect and validity of the foreclosure proceedings already attempted and by which it claims that the title of this defendant has been entirely extinguished and annulled; and this defendant claims the same benefit of this objection as if he had specially demurred to the bill therefor.

Further answering said bill, this defendant says that while the deed of assignment to this defendant passed all property, both in the District of Columbia and in the State of Maine, the complainant and the bondholders whom it claims to represent, by proceedings in the State of Maine, defeated the title of the assignee to any of the property there, and thereby the general creditors represented by this defendant under the deed of assignment were wholly

70 debarred from any recourse to the said property in Maine, and the same has been wholly lost to this defendant, as assignee of the American Ice Company, and that, as appears in and by the averments of said bill, the complainant claims to have enforced its lien on the said property in Maine to the exclusion of any rights of the general creditors, and that as the general creditors and that as the complainant has the right to the recourse to the property there and here, and this defendant, as assignee, has recourse only to the property here, he is advised and believes that he is entitled to have the assets marshalled as between him and the complainant, and that the complainant is not entitled to have recourse to the assets here until the claims of the general creditors have been satisfied, unless it first surrenders the property in Maine and consents to a resale of the whole property in the interest of all the creditors.

And, having fully answered, this defendant prays to be hence dismissed with his reasonable costs in this behalf.

WM. G. JOHNSON, *Assignee.*

CALDERON CARLISLE,
*Solicitor for Defendant.*

I do solemnly swear that I have read the annexed and aforegoing answer by me subscribed and know the contents thereof, and that the matters and things therein stated on my personal knowledge are true and those stated on information and belief I believe to be true.

WM. G. JOHNSON.

Subscribed and sworn to before me this twenty-third day of October, A. D. 1896.

[SEAL.] OSCAR LUCKETT,
*Notary Public.*

71 *Deposition of George B. Canney.*

Filed November 19, 1896.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, Plaintiff, *vs.* AMERICAN ICE COMPANY *et als.*, Defendants. } No. 17259. In Equity.

It is hereby stipulated and agreed by and between the counsel for the plaintiff and defendants that the deposition of George B. Canney may be taken before Judge Thomas W. Vose, a notary public in and for the city of Bangor, in the State of Maine, and that the same may be taken down stenographically, and when transcribed by the stenographer and signed by the witness be returned by the said Vose to the supreme court of the District of Columbia, together

with his certificate, and that said deposition may be read in the said cause without objection.

W. G. JOHNSON,
*For Defendants.*
CHAS. A. BAILEY,
*For Complainants.*

72 In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, Plaintiff, *vs.* AMERICAN ICE COMPANY *et als.*, Defendants. } No. 17259. In Equity.

Be it remembered that on this thirteenth day of November, 1896, personally appeared before me, Thomas W. Vose, a notary public in and for the city of Bangor and State of Maine, GEORGE B. CANNEY as witness for the plaintiff in the above-entitled cause, Eastern Trust and Banking Company, plaintiff, *vs.* American Ice Company *et als.*, defendants; Charles A. Bailey, of counsel for the plaintiff, and William G. Johnson, counsel for the defendants Willis and The American Ice Company, and the said witness, being first duly sworn, did depose and say, in response to the direct and cross interrogatories to him propounded by the said counsel, as follows:

Direct examination:

Q. Give your name and residence. A. George B. Canney; Bangor, Maine; secretary Eastern Trust and Banking Company.

Q. Mr. Canney, you have knowledge of the deed of trust which the Eastern Trust & Banking Company holds in favor of
73 the bondholders of the American Ice Company? A. I have.

Q. What was the amount of bonds that was originally issued, if you know? A. $40,000.

Q. Do you know what amount of them have been paid? A. There have been five thousand paid.

Q. What amount are outstanding now? A. Thirty-five thousand.

Q. Do you know in whose hands those bonds now are? A. Well, I have no personal knowledge where they are. We have a record or a statement made that accounts for some over thirty-three thousand, I think.

Q. Whether any steps have been made to sell the real estate under the mortgage power contained in the mortgage? A. Yes; steps were taken and the real estate of both properties was sold.

Q. Now, can you state what was done in relation to the sale of that property—steps were taken in regard to the sale of it? A. Well, the sale was—notice of the sale was published in two papers here and two papers in Washington. I think some three or four weeks before the first sale was made notice was published—the first

attempted sale was made. I have not the data; it was made some time, I think, in the summer of '94. The first sale was adjourned. I think the second sale was adjourned. Finally a sale was made in the fall, I think, of '94; the properties were sold; they were put up separately and sold, and the committee appointed by the bond-
holders to represent them purchased the two properties, pay-
74 ing $14,500 for the Penobscot River property and $14,000 for the Washington property. There has been no transfer of title made yet.

Q. Now, in regard to the Washington property, what, if any, understanding or agreement was made in regard to the possession of the property with the purchasers by the Eastern Trust & Banking Company? A. I think we were instructed to take possession of the Washington property. We employed counsel in Washington and have taken all necessary steps, as advised, to get possession of the property.

Q. Whether the arrangement was that the Eastern Trust & Banking Company were to obtain possession of the property before any transfer of it should be made? A. Yes; that was the instructions.

Q. Whether the purchasers have since notified you that they rescind the sale? A. They have. We have a written notice to that effect, as far as the Washington property is concerned.

Q. Now, have you got a statement of the account of the company as trustee in the matter of the sale? A. I have.

Q. Have you drawn it off from the book so that you have it? A. I have; yes. I will file it with this deposition.

Q. Whether the account book in any case shows any charges of interest upon these various items which you are charged? A. No; I think not.

Q. Whether the account book shows any charge made for
75 the trustee's services in and about the property? A. No; it does not.

Q. Whether any amount has been determined upon by the trustee, to your knowledge, for that service as a charge to be made? A. There has.

Q. And what amount? A. Well, up to March, '95, there was a charge made, not on the books, but the amount determined upon, the amount of two thousand dollars, commissions and services up to date—up to that time.

Q. You speak of a charge up to date. The property was sold when? A. Well, my recollection it was sold in the fall—in the summer of '94.

Q. Then you speak of the amount having been determined upon. Did that mean, up to the date of the sale, the charge of $2,000? A. That came about this way: Mr. Wilson, who represented the bondholders in the matter, asked me one day what our—he asked us some time, I think, in March, 95, what our commissions and charges were in the business—he was asking for information of the bondholders—and I told him, at the suggestion of our president—I told him that it was $2,000. So I fix the date that way.

Q. In regard to this sale, did you yourself personally have to do with this matter, Mr. Canney? A. I did; I arranged for it.

Q. Under your supervision and direction? A. It was.

76 Q. Whether this movement to foreclose the mortgage was the voluntary action of the Eastern Trust & Banking Company, or were you requested by the bondholders to proceed to sell the property? A. We were requested by the bondholders.

Q. In what form did that request come to you? A. A written request.

Q. Have you that request? A. I have.

Q. And where is it? A. I have it among my papers.

Q. Can you produce it here so that we can see it? Do you know, Mr. Canney, how many of those bonds had been defaulted before this sale was made? A. The interest was defaulted on all of them. I haven't a personal recollection of how many of the bonds themselves were due at the time of the sale. I think perhaps I could find a record of them somewhere; but the interest was defaulted on the whole issue of the thirty-five thousand of the remaining bonds unpaid at the time of the sale.

Q. And were there some of the bonds on which the principal was due before this sale? A. Well, as I say, I don't recollect. I think there was; but I think there is some record somewhere that will show.

Cross-examination:

Q. Mr. Canney, were you present at the sale of the real estate? A. I was.

77 Q. It was an auction sale? A. It was an auction sale.

Q. Do you remember who this committee of bondholders was? A. I have a record of them.

Q. Can you mention the names of them or any of them? A. Yes; Mr. John B. Huckins, of Boston; Mr. John Miller, of Washington; Edward L. Stewart, of Bangor.

Q. Have you among your papers a copy of the advertisement under which the sale took place? A. Yes.

Q. Will you please file it with the deposition? A. Yes.

Q. I will ask you to state, if you can, what the terms of sale were as announced at the sale. A. Well, I have them all here in this document.

Q. What is that paper? A. This is instructions to auctioneer from committee of the bondholders, instructing the auctioneer how to proceed in the sale of the property.

Q. Did he proceed in accordance with their instructions? A. He did.

Q. Well, will you please file those with your deposition? A. I will. This sale was adjourned from time to time. That is a copy of the instructions at the first sale.

Q. I referred to the instructions under which the auctioneer proceeded at the actual sale. A. Well, I don't know as I have

78 the written instructions at the actual sale; yes; I have the instructions to us from the committee of the bondholders how to sell the property at the last sale.

Q. These are the instructions under which the sale was made (showing witness Complainant's Exhibit 1)? A. Yes, sir.

Q. Were the terms and requirements suggested in this paper—Complainant's Exhibit 1—carried out at the actual crying of the sale? A. They were. I think that paper was read by the auctioneer before he finished the sale.

Q. Can you state—have you any recollection as to how many bidders there were for the Washington property? A. No; I don't think there were over three or four bidders for both properties?

Q. Do you know who they were? A. No; I haven't any recollection.

Q. Do you know anything about the bids? A. I do not.

Q. Don't recollect anything about it? A. I think Mr. Miller bid on behalf of the bondholders; did the actual bidding. He was one of the committee. I think he did the actual bidding, my recollection is.

Q. Do you know that there were any other actual *bona fide* bids except his? A. My recollection is that there was one.

Q. For the Washington property? A. Well, I couldn't say whether it was for the Washington property or for both properties.

79 Q. You can't recall, I suppose, how much it was? A. I can't.

Q. Now, when the sale was closed, the property was struck off to the bidder, was it? A. It was.

Q. By the auctioneer? A. Yes.

Q. What sum of money was paid then? A. It was a cash sale. As I say, there has been no transfer of title; there has been no payment made yet.

Q. Was any money paid at all? A. Not that I know of.

Q. Well, was any money paid to the Eastern Trust & Banking Company? A. No, sir.

Q. On account of either property? A. No, sir.

Q. And has the Eastern Trust & Banking Company made any deed of either property to the purchaser? A. No, sir; they have not.

Q. Who has possession of the property now? A. Well, we are looking after it as trustee yet. At the suggestion and requirement of the committee of the bondholders we are paying insurance as it comes round and pay the taxes.

Q. Is the property on a rental or has it been since the sale? A. Yes; the Maine property is.

80 Q. How long has it been under rental? A. Well, it was rented in the fall or winter of '94.

Q. At what rate of rent? A. $2,400 a year.

Q. And who has been receiving that rent? A. We have—the trust company.

Q. Have they paid over any of that to the bondholders? A. They have not.

Q. Was there any other terms *od* sale for either property an-

nounced at the time of sale—other than the terms contained in the Complainant's Exhibit No. 1? A. No; there was not.

Q. Now, with reference to the charges and commissions claimed by the complainant, The Eastern Trust & Banking Company, is that for services in making the sale as trustee under the mortgage or for some other services or both? A. Well, there has been no direct charge made on the books of any kind as to how it should be divided. It would represent services as trustee.

Q. Well, I understood you to say that the president had authorized you to say that the company had determined to make a charge of $2,000? A. Yes.

Q. Now, what I desire to know is whether that $2,000 was for the services of the company in making this sale in the fall of '94 or whether it was for some other matter. A. It was for that and for previous services.

Q. Previous services to whom? A. To the American Ice Company.

Q. Well, can you state what those services were? A. Oh, general services. We paid insurance from time to time and, as I say, paid the taxes.

81 Q. That is, for cash disbursed; you claim that this company has disbursed cash on account of this property? A. Not the $2,000; no, sir.

Q. But cash has been disbursed? A. Oh, certainly.

Q. And the $2,000 was to cover these disbursements also? A. For services and work and commission; for anything that it will go in for.

Q. Any cash that the company has paid out on account of this property, either for insurance or taxes, I presume you have book entries of? A. That appears in the statement that I will make you.

Q. You have book entries of that? A. Yes, sir.

Q. But the company has never made any book entry of any charge for any services rendered either in the matter of sale or prior to the sale or since? A. No, sir.

Q. Is that lump sum of $2,000 a sum that the company had definitely determined to claim, or was it a mere suggestion? A. It was what they intended to put in claim for.

Q. And that claim they made against the proceeds of the sale of the real estate, do they? A. Well, against anything that they could get. It came about this way: Mr. Woodard, representing the bondholders, asked us what our charges were, and we told him up to the time that he made the inquiry. I can give you just that date if you would like it; I have got it down here. There will be charges

82 since then. $2,000 was for commissions to the date of the sale.

Q. Can't you state commissions on what? A. I can't definitely. That is the amount that I stated to Mr. Woodard, attorney for the bondholders, March 1st, 1895.

Q. Is that a claim that the company makes under the terms of the mortgage, or simply a claim that it makes generally for services?

A. We were entitled to reasonable compensation, I think, in a mortgage, for our services as trustees.

Q. I understand, but I want to know whether this claim is made under the authority of the mortgage or is it for matters outside of the mortgage? A. Why, it all comes under the mortgage, as I look at it.

Q. Did you state that date? A. Services as trustee to March 1st, 1895. Now that would include our services at the time of the sale and up to the sale—services as trustees.

Q. And does the complainant company, The Eastern Trust & Banking Company, make any claim for any services since that time? A. We shall.

Redirect examination:

Q. I don't know as you have left it entirely clear; the $2,000 which you claim does not include any disbursements? A. It is for compensation, commission, services; I don't know which way
83 we shall put the claim in, but it doesn't include any disbursements of cash.

Recross-examination:

Q. So that any claim that you may have for cash disbursed on account either of insurance or taxes or any other matter would be in addition to that $2,000? A. It would.

GEO. B. CANNEY.

And I hereby certify that the said deposition of the said witness was then and there taken down stenographically and afterwards read over to the said witness, and by him signed in accordance with the annexed stipulation of counsel. I further certify that I am not of counsel for any of the parties in this litigation, and am not interested in the proceeding, and that my fee for taking the said deposition, amounting to five dollars, has been paid by the plaintiff.

[SEAL.] THOMAS W. VOSE,
*Notary Public.*

*Transcript of Entries from Cash Book of Eastern Trust & Banking Co. of Bangor, Me., in Account with American Ice Co. of Washington, D. C.*

Page 323. Under date of March 22, 1894.

*American Ice Co. Foreclosure Account Expenses.*

| | | |
|---|---|---|
| To taxes town of Hampden, 1893 ..... .... | $317.90 | |
| To insurance of houses Royal J. H. B. & Co.... | 32.50 | |
| North Ame. D. M. H. & Son..... | 81.25 | |
| Atlas W. F. C..... ..... | 93 | |
| | | $524.65 |

84 Page 328. Under date of March 28, 1894.

*American Ice Co. Foreclosure Account.*

| | | |
|---|---|---|
| To G. B. Canney, sect'y, expenses to Washington. | $80 | |
| " Edwards & Barnard, examination of mortgage and opinion | 25 | |
| | | $105.00 |

Page 329. Under date of March 29, 1894.

*American Ice Co. Foreclosure Account.*

| | | |
|---|---|---|
| To insurance on houses, Imperial | $33.25 | |
| Hanover | 48.75 / 24.37 | 73.12 |
| Springfield | | 24.37 |
| Hume | | 61.50 |
| Springfield | | 27 |
| Fire Asso | | 65 |
| State of Penn | | 65 |
| | | $349.24 |

Page 378. Under date of May 8, 1894.

*American Ice Co. Foreclosure Account.*

| | | |
|---|---|---|
| To adv't sale, Washington Post | $81.90 | |
| " " Daily News | 13.33 | |
| " " | 10 | |
| | | $105.23 |

Page 379. Under date of May 9, 1894.

*American Ice Co. Foreclosure Account.*

| | | |
|---|---|---|
| To C. Pearl, auctioneer | $15 | |
| Room at Bangor house | 1 | |
| | | $16.00 |

85 Page 385. Under date of May 14, 1894.

*American Ice Co. Foreclosure Account.*

| | | |
|---|---|---|
| To adv't Washington Star | $83.98 | |

Page 418. Under date of June 8, 1894.

*American Ice Co. Foreclosure Account.*

| | | |
|---|---|---|
| Boutelle & Burr, adv't | $1.75 | |
| C. S. Peare, auctioneer | 15 | |
| Room, for sale, at Bangor house | 1 | |
| | | $17.75 |

Page 433. Under date of June 19, 1894.

*American Ice Co. Foreclosure Account.*

To paid Washington Post, notice adjourned sale.. ..... $9.90

Page 479. Under date of June 30, 1894.

*American Ice Co. Foreclosure Account.*

To Edwards & Barnard, legal service to date..... $25

New cash book, pages not numbered.

Under date of Sept. 29th, 1894, to adv't sale..... $3.50

Under date of Dec. 6, 1894.

*American Ice Co. Foreclosure Account.*

Taxes, 1894..... ..... ..... $226.80

Under date of Dec. 28, 1894.

*American Ice Co. Foreclosure Account.*

Expenses Receiver & Co..... ..... $1,051.42

86 Under date of Feb'y 13, 1895.

*American Ice Co. Foreclosure Account.*

C. S. Pearl, commissioner, sale Sept. 8... .... ..... $25.00

Under date of Nov. 8, 1895.

*American Ice Co. Foreclosure Account.*

Davis & Bailey..... ..... ..... $50.00

DR.

Page 379. Under date of May 9, 1894.

*American Ice Co. Foreclosure Account.*

By error in charging insurance..... .... $17.38

True copies of entries from cash book.
Attest: GEO. B. CANNEY, *Sec'y.*

*Trustee's Sale of the Real Estate of the American Ice Company.*

Whereas the American Ice Company, a corporation existing by virtue of the laws of the State of Maine, having a place of business in Bangor, in the county of Penobscot, in said State, and in Washington, in the District of Columbia, did on the 2d day of December, 1889, make, execute, and deliver unto the Eastern Trust and Banking Com-

pany of Bangor, Me., as trustee, a mortgage deed of all and singular its real estate, as described below, for the purpose of securing the payment of the interest and principal of certain bonds issued by said American Ice Company, as set forth in said mortgage
87 deed of trust, originally amounting to the principal sum of $40,000, which deed of trust is recorded in Liber 1439, folio 417, one of the land records of the District of Columbia, and the conditions of such mortgage deed of trust having been broken by said American Ice Company, and by reason of such breach of condition the holders of the bonds secured by said Eastern Trust and Banking Company, as trustee, should forthwith enforce the rights of the bondholders under said mortgage deed of trust and foreclose upon and sell said real estate according to the conditions of said deed:

Now, therefore, the Eastern Trust and Banking Company, trustee, as aforesaid, will sell at public auction, at the Bangor house, in said city of Bangor, on the 9th day of May, 1894, at 10 o'clock a. m., the following-described real estate, to wit:

Two certain lots or parcels of land in Hampden, in the county of Penobscot, aforesaid, bounded and described as follows:

That portion of the Cyrus Emery farm which lies between the Penobscot river and the new county road, being all of said farm lying east of said road, and containing thirty (30) acres, more or less, and being the same premises conveyed by the trustees of said Cyrus Emery's estate by said deed recorded in Penobscot registry of deeds, volume 502, page 288; to which deed, as well as to a deed from Augustus J. Emery, recorded in said registry of deeds, volume 530, page 98, reference is hereby had.

A lot formerly a part of the homestead of John Hardin, described and bounded as follows, viz: Beginning at a stake on the
88 dividing line between land of said Harden and land formerly of the heirs of Cyrus Emery, thence at right angles with said dividing line twelve and one-half rods, more or less, to the dividing line between land of said Harden and land of Doddwell; thence on said dividing line to the Penobscot river; thence down said river to said dividing line between land of said Harden and land formerly of the heirs of Cyrus Emery; thence on said Emery's line to the place of beginning, together with all the buildings and fixtures on the two said above-described parcels of land, being the same premises conveyed by the Penobscot River Ice Company to said American Ice Company by deed dated June 10, 1889, and recorded in the Penobscot registry of deeds, Book 593, page 449.

Also all that piece or parcel of land, with the improvements thereon, lying in the city of Washington, in the District of Columbia, and being opposite square 270, in said city and District, commencing for the same at the southeast corner of square number two hundred and seventy, running thence southerly with the west line of Thirteenth street to the channel of the Potomac river; thence westerly with the west line — -nel to a point opposite the southwest corner of square number two hundred and seventy; thence due north to the said southwest corner of said square number two hundred and seventy, following the eastern line of what is alleged

to be Thirteen-and-a-half street; thence with the southern line of said square two hundred and seventy two hundred and fifty-five feet one inch, to the place of beginning, together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining, and all
89 the remainders, reversions, rents, issues, and profits thereof, and all the estate, right, title, interest, claim and demand, either at law or in equity, or otherwise however, of the said parties of the first part of, in, to, or out of the said piece or parcel of ground and premises, being the same premises conveyed by E. M. Willis and another to said American Ice Company by indenture dated December 2, 1889, and recorded in land records of the District of Columbia, Book 1445, page 16—

Together with all the rights and easements, appurtenant-, privileges, or options in the matters of wharfing or other riparian rights of any kind whatsoever which may have been acquired by said American Ice Company by virtue of the covenants and agreements in said deed of said Willis *et al.* con'ained.

The terms and conditions of said sale will be announced by said trustee at the time and place of the auction sale.

The trustee will reserve the right to adjourn such sale or sales under the authority conferred by said deed of trust.

EASTERN TRUST AND BANKING COMPANY, *Trustee*,
By GEO. B. CANNEY,
*Secretary, Bangor, Me.*

Ap. 7, 14, 21, 28.

By Duncanson Bros., auctioneers.

*Adjourned Trustee's Sale.*

Notice is hereby given that the sale of the property of the American Ice Company, heretofore advertised to occur on the 9th
90 day of May, 1894, was adjourned to Friday, the 8th day of June, A. D. 1894, at 11 o'clock in the forenoon, at the Bangor house, in Bangor, Me., at which time and place the Eastern Trust and Banking Company, as trustee for the bondholders, will sell at public auction, to the highest bidder, the property of said ice company. The property consists of land, wharves, ice-houses, and elevators in Hampden, Me., on the Penobscot river, and wharf property and ice-houses situated thereon in Washington, D. C.

EASTERN TRUST AND BANKING COMPANY, *Trustee*,
By GEO. B. CANNEY, *Secretary.*

*Trustee's Sale of Valuable Wharf Property Occupied by the American Ice Company.*

This is to give notice that the undersigned, as trustee, will, on Saturday, September eighth, 1894, at ten o'clock a. m., at the Bangor house, in the city of Bangor, State of Maine, sell, at public

auction, all that parcel of land in the city of Washington, in the District of Columbia, with improvements thereon, and the privileges thereto appertaining, being opposite square two hundred and seventy (270), and described as follows: Commencing at the southeast corner of said square; thence southerly with the west line of 13th street to the channel of the Potomac river; thence westerly with said channel to a point opposite the southwest corner of said square, following the eastern line of what is alleged to be 13th street; thence with the southern line of said square 255 feet 1 inch to the beginning. This sale will be made by virtue of the powers vested in said trustee by a certain mortgage deed of trust
91 recorded in Liber 1439, folio 417, one of the land records of the District of Columbia, and is a postponement or adjournment of the sale heretofore advertised to take place May 9, 1894, at the same time and place.

Terms of sale will be announced at said auction sale.

EASTERN TRUST AND BANKING CO., *Trustee*,
By B. F. LEIGHTON, *Its Attorney*, 452 *D St.*

COMPLAINANT'S EXHIBIT 1.

To the Eastern Trust & Banking Company:

The undersigned, a committee representing nearly all the holders of the bonds secured by the mortgage of the American Ice Company on property in Washington, D. C., and in Hampden, county of Penobscot, State of Maine, at the sale of said property to be held this day by said Trust Co. under the mortgage from said American Ice Co. to said Trust Co., hereby request that the property in Washington and the property in Hampden be put up separately, the Washington property to be put up first, and that the auctioneer announce as the terms of sale that one-third of the purchase-money is to be paid in cash, one-third in one year, with interest, and one-third in two years, with interest, interest to be payable semi-annually, the payments in one and two years to be secured by mortgages upon the property sold, with proper provisions in said mortgages to ensure the prompt payment of taxes on the said property, and that the buildings on said property shall be kept covered by insurance to at least the amount due and secured by the mortgages, loss, if
92 any, to be payable to the mortgagee to the extent of his interest, and that the buildings be kept in suitable state of repair.

Bangor, September 8th, 1894.

EDWARD L. STEWART.
J. B. HUCKINS.
JOHN MILLER.

*Testimony of One Witness for the Complainant.*

Filed April 29, 1897.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY
*vs.*
AMERICAN ICE COMPANY *et al.*
} Equity. No. 17259.

*Be it remembered* that at an examination of witnesses, begun and held pursuant to notice, on the 27th day of March, 1897, at which said examination there were present Benjamin F. Leighton, Esq., solicitor for the complainant, and William G. Johnson, Esq., solicitor for the defendants, personally appeared before me, J. Arthur Lynham, an examiner in chancery of said court, the within-named witness, who, being called for and on behalf of the complainant and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matters at issue in the above-entitled cause, did depose and say what is hereinafter set out as stated by him.

J. ARTHUR LYNHAM, *Examiner.*

93 In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING CO.
*vs.*
AMERICAN ICE COMPANY *et al.*
} Equity. No. 17259.

WASHINGTON, D. C., *March 27th*, 1897,
SATURDAY, at 2 o'clock p. m.

Met, pursuant to notice to the solicitors for the defendants, to take testimony on the part of the complainant in the above-entitled cause.

Present: Benjamin F. Leighton, Esq., solicitor for the complainant, and William G. Johnson, Esq., of solicitors for the defendants.

Whereupon—

NOTE.—It is hereby stipulated and agreed by and between the solicitors for the respective parties that the following certificates of publication may be offered in evidence in lieu of more formal proof of the several advertisements of the sale in complainant's bill described and of the adjourned notices of such sale.

(And the same are filed by the examiner, marked Exhibits J. A. L. Nos. 1, 2, 3, 4, 5, 6, 7, and 8 respectively.)

Mr. LEIGHTON: I want to offer in evidence a stipulation entitled in this cause and signed by the respective counsel to it.

94 (And the same is filed by the examiner, marked Exhibit J. A. L. No. 9.)

Mr. LEIGHTON: I also desire to file this further stipulation entitled in this cause and signed by the respective counsel to it.

(And the same is filed by the examiner, marked Exhibit J. A. L. No. 10.)

Thereupon JOHN MILLER, a witness of competent age, produced on the part of the complainant and being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. LEIGHTON:

Q. Mr. Miller, what is your business? A. My business is coal and brick manufacturing.

Q. Have you any interest in the American Ice Company? A. Bonds?

Q. Yes. A. Yes, sir.

Q. To what extent? A. Nine thousand eight hundred dollars ($9,800) worth of them.

Q. Do you still own them? A. Yes, sir.

Q. Were you present in Bangor at a sale of the property embraced in the deed of trust in these proceedings described, which
95 took place in May of 1894? A. I went to Bangor to attend the sale in May, 1894, and they postponed it.

Q. Where was the sale to have taken place? A. At the Bangor house.

Q. Were you present at the Bangor house at the time for which the notice was given to take place? A. Yes, sir.

Q. How many persons were there at the time of that sale? A. Oh, I suppose twenty-five (25) or thirty (30).

Q. Where was the property offered? A. Offered for sale in the parlors of the Bangor house.

Q. By whom? A. By the auctioneer and the representatives of the Eastern Trust and Banking Company.

Q. Were there any bids at that time? A. Well, there was no bid over ten thousand dollars ($10,000).

Q. Were there any bidders present? A. Yes; there were some in there that bid on the property; not enough, though, so as we could sell it.

Q. Why was the property not sold at that time? A. Because there was not as much money offered as we thought it was worth.

Q. How were the properties put up? A. The property in Washington and the property in Bangor were put up separate.

96 Q. To what time was the sale postponed? A. It was postponed, I think, from May until June. One month, I think.

Q. What as to the notice of the postponement of the time at which the property was to be subsequently offered? A. They stated that the sale would be adjourned or postponed, I don't remember which, for one month, to take place at the same place.

Q. Were you there at the adjournment in June? A. Yes, sir.

Q. What took place at that time? A. Well, they did not get sufficient money offered in June, and then they postponed it, I

think, until September, 1891 or '2. I am not positive about the date, but it was in September.

Q. Where did the sale take place at the second offering? A. At the Bangor house.

Q. Same house and same place? A. Yes, sir.

Q. How many persons were present at that sale? A. I think there were probably thirty (30) or more.

Q. Any bids? A. Yes, sir.

Q. How many? A. Oh, there was a dozen bids, I think.

Q. What was the best offer bidden at that cry? A. The
97 best offer—that is, under the bondholders' offer—was thirteen thousand ($13,000) or thirteen thousand five hundred ($13,500), I am not positive which. That was bid, I think, by the Knickerbocker Ice Company of Philadelphia. They had a representative there and we bid it in at fourteen thousand dollars ($14,000).

Q. At the June sale? A. Oh, no; this is the September sale.

Q. I am speaking of the June sale. A. At the June sale we didn't have any offer over ten thousand dollars ($10,000).

Q. Well, that was the sale I was speaking of. How many persons were present at the June offering? Does the evidence which you have just given apply to the offering which took place in June or September? A. About a dozen or more applies to June.

Q. There were about a dozen in June? A. Yes, sir; or more.

Q. Were there any bids at the June offering? A. None that we would consider at all; nothing over ten thousand dollars ($10,000).

Q. What effort was made at the time to make a sale? A. Well, we notified the different ice companies all over the country that we thought would be apt to buy the property—people that would buy the property in New York and people that sell the ice in Philadelphia, and the people here in Washington.

Q. In what way? A. We notified them through the paper, and also sent them a notice of it.

98 Q. When did the next sale take place or next offering? A. Well, this is the last one, you know. That was in September.

Q. Was any notice of the date of the September sale given at the time of the adjourned sale in June? A. When they adjourned the sale in June they adjourned the sale until September, either 1891 or '2, I am not positive which, to take place at the Bangor house, Bangor, Maine.

Q. Were you present at that sale? A. Yes, sir.

Q. Where did it take place? A. In the Bangor house.

Q. How many persons were present? A. Something over thirty (30); between thirty (30) and forty (40), I should judge.

Q. How many bids were made at that sale? A. About a dozen; twelve or more.

Q. Was the property finally struck off? A. Yes, sir.

Q. Do you recollect at what price? A. Fourteen thousand dollars ($14,000).

Q. Which property are you speaking of now? A. The property near Bangor.

Q. How were the properties offered? A. Separate.

Q. Do you recollect what the Washington property brought? A. I think it was fourteen thousand seven hundred and fifty dollars ($14,750).

99 Q. Were there any bidders at the last sale in September from out of town that you know of? A. Yes, sir.

Q. Who? A. Well, there were some people there from Philadelphia; some from New York; some from some place in Maine, between Portland and Bangor; I don't know the name of the place; and then there were some Bangor builders there. The highest and best bid that we got was either thirteen thousand ($13,000) or thirteen thousand five hundred ($13,500), except the one that the bondholders put in of fourteen thousand ($14,000). I bid fourteen thousand ($14,000) for the bondholders.

Q. Of this last sale was there any special notice given, do you know, to the public? A. Notice through the papers, and the people in Washington here I notified myself.

Q. The people generally, or a special class of people who would be likely to purchase? A. We notified the ice companies here. I went around to see them, and saw Mr. Church, of the Independent, and Mr. Bartlett, of the Great Falls, and Mr. Yerkes, of the Independent.

Q. Do you know whether or not Mr. Willis, the defendant in this case, had knowledge of these offerings? A. It was in the newspaper here. I presume that he had knowledge of them. In fact, I know that he had knowledge of it, because he and I talked it over prior to sale.

Q. Prior to the sale? A. Yes, sir.

100 Q. Has there been any settlement of this last sale—that is, the September sale—has there been a transfer of the title and settlement of the sale of the property in Bangor? A. There has.

Q. State what it was. A. Why, the property was sold at private sale to the consolidated ice companies of New York for sixteen thousand five hundred dollars ($16,500), and after paying the expenses out, insurance and taxes, taking care of the property, and sundry expenses, there was a balance left of nearly fourteen thousand dollars ($14,000).

Q. Gave you what per cent. of your bonds? A. Thirty-nine (39) per cent.

Q. Has the balance been paid in any manner? A. No, sir.

Q. Thirty-nine (39) per cent., then, is the net proceeds of the last sale that was made by the committee of the bondholders? A. Yes, sir.

Q. What about the Washington property? A. The Washington property—why, the assignee of the American Ice Company would not give us possession and we would not close the sale until the trust company would give us possession.

Q. What is the situation of that sale as to the property situated

here? A. The situation is, I believe, that the assignee of
101 the American Ice Company is holding the property until this suit is settled.

Q. Has there been any transfer of the title by the Eastern Trust and Banking Company to the committee of the bondholders of the property situated here? A. The property was transferred by deed jointly from the Eastern Trust and Banking Company to the committee of the bondholders that bought it in.

Q. You refer to the property situated in Maine? A. Yes, sir.

Q. I refer to the property situated in Washington. A. Well, there has been no transfer of this property in Washington, and no deed has been given for it.

Q. Well, what is the situation there; who was this committee of bondholders that acted on behalf of the bondholders? A. Mr. E. L. Stewart, of Bangor, Maine, and John B. Hickins, of Boston, Massachusetts, and myself were appointed a committee of the bondholders by the bondholders at a meeting they held in Bangor in September, 1894.

Q. Do the bondholders still claim any interest in the sale that was made in September of the Washington end of the property, or has that been receded from? A. They still claim that they have the right to have that property at their bid—the Washington property at their bid.

Q. At the bid that was made for it? A. Yes, sir; in
102 Bangor.

Q. Has there or has there not been any decision of that sale by the committee of the bondholders to the purchasers? A. Well, I don't know how that would be.

Mr. JOHNSON: Well, I object to that question. It calls for the witness' conclusion about some matters of fact or law, both.

A. (Continuing:) The state of the case is, of course, that they bought it in at auction, and the trust company has never been able to deliver it to them, because they didn't have possession of it.

Q. What were the terms of the sale as to the Washington end of the property—what was the condition under which the bid was made for that property? A. The terms of sale were that they were to give us possession, or that the parties that bought it were to be put in possession.

Q. Have you given any notice to the trust company that you declined to complete that purchase? A. No, sir; not that I know of.

Cross-examination.

By Mr. JOHNSON:

Q. Mr. Miller, do you know how far Bangor is from Washington? A. I don't know exactly how far it is, but I think it is about four (4) or five hundred (500) miles—five hundred (500) miles, probably; or six hundred (600).

103 Q. Is not all the property involved in this deed of trust

situated in Bangor? A. It is situated just outside of Bangor and in Washington, D. C.

Q. I say is not all of it situated in Bangor? A. No, sir; it is not. It is just on the outskirts of Bangor and also in Washington.

Q. In a place called Hampton, ain't it? A. In a county called Hampton. I have never been to Hampton. I have been on this property, though, and have also been to Bangor several times—the electric car road down there—just outside. I thought it was right in the outskirts of Bangor.

Q. Now, there were several offers for these two properties—the property in Maine and the property in Washington—but there was no sale made until September, you say? A. No, sir.

Q. Who conducted the several offers of sale? A. The auctioneer there, at Bangor.

Q. Well, for whom? A. For the Eastern Trust and Banking Company.

Q. The complainant in this suit? A. Well, yes, sir.

Q. And the trustee under the deed of trust? A. Certainly.

Q. They withdrew the property at these previous offers? A. Yes, sir.

Q. And at the September sale they made a final sale of it? A. Yes, sir.

*Q. Now, you say*

104 Q. Now, you say that they sold the Maine property first? A. Well, I don't know. I could not say which property they put up first—whether it was the Washington property or the Bangor property.

Q. Well, they offered them separately, at all events? A. Yes, sir.

Q. They were not offered together? A. Yes; they were offered together, too; offered together and offered separately.

Q. Which way were they sold? A. They were sold separately.

Q. Well, were they sold separately under the joint offering or the separate offering? A. They were sold under the separate offering. They could not get any bid by putting them up together, and so they separated them and sold the Bangor property for fourteen thousand dollars ($14,000), and the Washington property for fourteen thousand seven hundred and fifty dollars ($14,750).

Q. Now, do you know who purchased the Maine property? A. Yes, sir.

Q. Who? A. I bid it in for the boudholders, as one of the committee.

Q. In whose name was it struck off? A. Why, it was struck off, I think, in the name of the committee—John B. Huckins, E. L. Stewart, and John Miller.

105 Q. Do you remember who the auctioneer was? A. I don't know his name, Mr. Johnson.

Q. Now, how much money did Mr. Huckins, Mr. Stewart, and yourself, or either of you, pay for the Maine property? A. Fourteen thousand dollars ($14,000).

Q. In cash? A. No, sir.

Q. How did you pay it? A. They have got our bonds.

Q. Well, my question is, What, if anything, you paid? A. We didn't pay any cash money at all.

Q. Did you give any notes? A. No, sir.

Q. Did you give anything at all? A. Nothing but our bonds.

Q. Did you give up any bonds? A. Yes, sir.

Q. When? A. Why, when they asked for them.

Q. Well, when was that? A. Well, they didn't ask for my bonds until—well, about two weeks ago, when they were going to make a dividend.

Q. They asked for some bonds from you two or three weeks ago? A. Probably a month ago.

Q. How many bonds did they ask for? A. Asked for all that I had.

Q. Who is it that asked for them? A. The Eastern Trust and Banking Company.

106 Q. Did you turn them over? A. I did.

Q. Nine thousand and eight hundred dollars ($9,800.00)? A. Yes, sir.

Q. And have they been cancelled? A. Yes, sir; the bonds came back to me with a stamp on their face, "thirty-nine (39) per cent. dividend paid on this bond," and a check for thirty-eight hundred and twenty-two dollars ($3,822.00), with a letter stating that they were——

Q. Well, never mind the statements of the letter. Now, that is all that you personally know about anything in connection with the advertisement and the sale of the Maine property? A. That is all that I know.

Q. That some time within the last thirty (30) days you sent your bonds to the Eastern Trust and Banking Company at their request? A. I took them there and left them there, and they made the dividend and sent the bonds.

Q. And they made the indorsement on them that thirty-nine (39) per cent. of them had been paid, and sent you a check for thirty-eight hundred and twenty-two dollars ($3,822.00)? A. Yes, sir; I think that was the amount.

Q. Now, how much did you or either of those other two gentlemen, at the time of the September sale, pay for the Washington property? A. Why, I didn't pay any cash.

107 Q. Did Mr. Huckins? A. I don't know. I don't know whether he did or not.

Q. Did Mr. Stewart? A. I don't know whether he did or not.

Q. You didn't see either of them pay anything? A. No; I didn't see either of them pay anything.

Q. Did the Eastern Trust and Banking Company ever make any deed to you or to Mr. Huckins or to Mr. Stewart for the property in Maine? A. They made a deed to the Consolidated Ice Company.

Q. I didn't ask you that. I asked you if they ever made any deed to you or to Mr. Huckins or to Mr. Stewart? A. None except

the deed that they made when they sold the property to the consolidated ice companies. None that I know of.

Q. Did they ever make any deed conveying the property to you? A. No.

Q. Did they ever make any deed conveying it to Mr. Huckins, that you know of? A. Not that I know of.

Q. Did they ever make any deed conveying it to Mr. Stewart, that you know of? A. Not that I know of.

Q. Now, from the sale in September up to the present time, did you personally ever have possession of the real estate in Maine? A. Mr. Stewart——

108 Q. Mr. Miller, my question is a simple one. Did you, from the time of the sale in September up to the present time, ever personally have possession of the Maine property? A. Personally I did not; but Mr. Stewart, as one of the three of the committee, had a watchman on the property from the time it was sold until it was leased.

Q. Now, who is Mr. Stewart? A. He is a gentleman that lives in Bangor, Maine.

Q. What position does he occupy with reference to the Eastern Trust and Banking Company? A. I don't know that he occupies any position.

Q. Is he not a stockholder and an official of that company? A. He is not.

Q. Are you quite sure of that? A. Not to my knowledge. I don't know who is a stockholder and who is an official of it.

Q. Are you sure that he is not a stockholder? A. Not to my knowledge.

Q. You would say that he was not? A. I understood when I was in Bangor that he was not.

Q. Do you know where his office is? A. Yes, I do.

Q. Where is it? A. It is in Bangor.

Q. Do you know whereabouts in Bangor? A. I don't know the street. It is way down the lower end of the street in Bangor.

Q. What business is he in? A. In the ice and commission business.

109 Q. Now, you say he had a watchman on this property. *Q.* He had a watchman. He was there from the time it was sold in December until we leased it.

Q. That is what he told you? A. That is what the watchman's bill calls for.

Q. You don't know anything about it personally? A. No; only what I have been told and what he wrote me.

Q. Then, personally, you don't know anything about that? A. No; but as cotrustee he wrote me that he had the watchman on there, and sent me the bill to approve for his services.

Q. And for how long a time was that? A. From September until the time the property was leased.

Q. When was it leased? A. I think probably about January.

Q. January following September? A. Yes, sir; some five (5)

months I think the man's time called for, or something like that. It was leased, I guess, before Christmas.

Q. Now, who got the rent for the property after it was leased? A. The rent was paid in to the Eastern Trust and Banking Company for the benefit of the bondholders or the parties who purchased it.

Q. Did you get that money? A. No, sir; I did not.

110 Q. Did Mr. Huckins? A. No, sir.

Q. Did you ever get any deed from the Eastern Trust and Banking Company conveying the Washington property to you? A. No, sir; we did not.

Q. Do you know of any deed having been executed by the company conveying it to Mr. Huckins or to Mr. Stewart? A. I do not.

Q. And you have never had possession of that property? A. No, sir.

Q. And have your yourself ever received any income from it? A. From the Washington property?

Q. Yes. A. No, sir; I would like to, though.

Q. Now, you stated that the Washington property was sold to Mr. Huckins and Mr. Stewart and yourself? A. Yes, sir.

Q. How were the terms of that sale announced? A. They were announced by the auctioneer when he put up the property.

Q. Were there any different terms announced at the time of the sale to you from what was announced to purchasers and bidders generally—did you have any special terms made for you by the auctioneer? A. Well, I can't say about that, Mr. Johnson. When we had the bid of thirteen thousand five hundred dollars

111 ($13,500) offered, the committee of the bondholders went out and consulted with the officials of the Eastern Trust and Banking Company and their lawyers, and we decided to make a bid of fourteen thousand dollars ($14,000), and unless we got more than that we would not let the property go to any one outside of the bondholders.

Q. Now, do you remember that the auctioneer announced his terms of sale by reading from a paper—a written paper of the terms of the sale? A. I presume that he did.

Q. I mean, don't you recollect that he did? A. I think he did. It has been three or four years since that thing happened, and it is not fresh in mind.

Q. And the terms of sale announced were the same for all bidders? A. I think so.

Q. That is, you did not understand that it was offered to you on any different terms from the offer made to other bidders? A. No; I did not.

Q. And your bid was made on the same basis as everybody else's, so far as the announced terms were concerned? A. I presume it was.

Q. I mean so far as you knew about it? A. Certainly.

Q. You stated that the Consolidated Ice Company of New York had purchased the Maine property? A. Yes, sir.

Q. Were you present at the actual sale of the property
112 to the New York Ice Company? A. Yes, sir; I made the deal myself.

Q. Where was it made? A. Right in Bangor.

Q. In Bangor? A. Yes, sir.

Q. Now, when was that made? A. Why, some time within the last month.

Q. Have you any way of fixing the date? A. Well, let me see; it is within the last month, Mr. Johnson.

Q. Was it during March? A. Yes, sir.

Q. Some time during March? A. Some time during March.

Q. Was this indorsement on your bonds and the check after the sale to the Consolidated Ice Company of New York or before? A. Afterwards.

Q. After? A. Afterwards.

Q. Who paid the money for the property sold to the Consolidated Ice Company? A. Why, the Consolidated Ice Company paid four thousand dollars ($4,000) on the property before I went to Maine. I would not let them have it——

Q. Well, one minute. Then you say they paid four thou-
113 sand dollars ($4,000)? A. Deposit before I went to Maine.

Q. And after you went there you said you were present at the consummation of the sale? A. Yes, sir.

Q. Then twelve thousand dollars ($12,000) additional was paid? A. Twelve thousand five hundred dollars ($12,500) additional was paid.

Q. To whom was that paid? A. Paid to the Eastern Trust and Banking Company.

Q. Do you remember by whom? A. By a draft on New York attached to the deed. Some officer of the New York company was there. They had a representative there. I signed the deed, and Mr. Huckins signed the deed, and Mr. Stewart signed the deed, and we left it with the Eastern Trust and Banking Company to send to New York on Monday; that was on Saturday. The Eastern Trust and Banking Company and Mr. Field, the representative of the New York people, were dickering for the property, and they telegraphed me to come up there, and I went up and sold it for sixteen thousand five hundred dollars ($16,500), and got it for the property.

Q. What Mr. Field was that? A. Charles E. Field, that used to be with the American Ice Company.

Q. Used to be with the Eastern Trust and Banking Com-
114 pany, didn't he? A. He might have been a director in there; he is not a director now; I know that.

Q. Then, this sixteen thousand five hundred dollars ($16,500) was paid to the Eastern Trust and Banking Company? A. Yes, sir.

Q. By the Consolidated Ice Company of New York? A. Yes, sir.

Q. The sale to the Consolidated Ice Company of New York, I take it, was a private sale and not at auction? A. Yes; it was a private sale, made by the committee of the bondholders.

Q. Do you know of your own knowledge whether the Consolidated

Ice Company of New York has possession of the Maine property? A. Yes; they have possession of it.

Q. Do you know how soon they got possession? A. Yes, sir; they got possession of it when I was there.

Q. That is, during the present month? A. Yes, sir; and put ice in the houses, and got them full of ice, I guess, now.

Q. Did this sale to the Consolidated Ice Company of New York cover all the real estate in Maine formerly belonging to the American Ice Company? A. Yes, sir; all the real estate in Maine.

Q. Did it also include the tools and machinery belonging to
115 the ice-harvesting plant? A. It included all the machinery. The tools did not belong to the bondholders. We did not sell them.

Q. Do you know anything about them? A. They were sold, I think, by the receiver.

Q. You have no personal knowledge about that, have you? A. Only what they told me there.

Q. I say, you have not any personal knowledge about that? A. No.

Q. Except that you know that the tools were not included in the sale to the New York Ice Company? A. Yes, sir; I know they were not included in the sale.

Redirect examination.

By Mr. LEIGHTON:

Q. Mr. Miller, who rented the property in Maine after the purchase by the committee of the bondholders? A. The committee of the bondholders rented it; at least, they authorized the Eastern Trust and Banking Company to make the lease.

Q. The committee of the bondholders fixed the terms? A. Fixed the terms and fixed the price.

Q. In this settlement that was made with the bondholders, were the rents collected by the Eastern Trust and Banking Company accounted for? A. The Eastern Trust and Banking Company made a statement of the amount of rents that they had received and all the income they had received from the property to us;
116 showed us the bills—all the bills that they had paid against the property—and gave the property credit for the sixteen thousand five hundred dollars received from the Consolidated Ice Companies of New York and the forty-eight hundred dollars ($4,800) rent received from the Penobscot River Ice Company for the two years that they had it rented.

Recross-examination.

By Mr. JOHNSON:

Q. Mr. Miller, who was the tenant? A. The tenant was the Penobscot River Ice Company.

Q. Was that a Maine company? A. Yes, sir.

JOHN MILLER.

Subscribed before me this 24th day of April, 1897.
J. ARTHUR LYNHAM, *Examiner.*

117 I certify that the foregoing deposition (comprising 25 typewritten pages) was taken down by me in shorthand, as an examiner in chancery, from the statements when and as uttered by the deponent thereof; that the same was thereafter transcribed and reduced by me into print, and thereupon read and subscribed by the deponent in my presence.

I further certify that my fee of $15.63 for taking, certifying, and returning said deposition has been paid to me by the complainant, and that the same is just and reasonable.

And I further certify that I am not of counsel nor in anywise interested in this case.

J. ARTHUR LYNHAM,
*Examiner in Chancery.*

118 EXHIBIT J. A. L. No. 9—STIPULATION.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING CO., Complainant, *vs.* AMERICAN ICE CO. *et al.*, Defendants. } No. 17259. In Equity.

The complainant and the defendants in the above-entitled cause, by their respective counsel, hereby stipulate and agree as follows, to wit:

That the printed transcript of the record in the case known and styled as The Eastern Trust and Banking Company, appellant, *vs.* Edward M. Willis and Wm. G. Johnson, assignee, appellees, heretofore heard and determined in the Court of Appeals of the District of Columbia, which is filed with this stipulation and marked "Complainant's Exhibit No. 2," may be offered in evidence without objection or exception thereto in lieu of more formal proof, and with like effect as though such proof were adduced and offered in evidence, for the following purposes, to wit:

1st. In place of a duly certified copy of complainant's charter, to show the terms and provisions of said charter.

2d. In lieu of a duly certified copy of the mortgage sought to be foreclosed and described in complainant's bill, for all pur-
119 poses for which a duly certified copy of said mortgage would be admissible.

3d. In lieu of the production of the record in the cases of The Eastern Trust and Banking Company *vs.* Edward M. Willis and Wm. G. Johnson, assignee, to show the proceedings had and taken by complainant to recover possession of said property by virtue of said mortgage.

It is further stipulated and agreed that the said William G. Johnson, as assignee, will, at the proper time, account before the auditor, or as may be directed by the court, for the rents, issues, and profits

of the real estate in complainant's bill described received and collected by him in his character of assignee, as aforesaid.

It is admitted on the part and behalf of the defendants that the bonds described in said deed were executed and delivered unto the said Eastern Trust and Banking Company, as recited in said deed, and were by the said Eastern Trust and Banking Company delivered to the parties entitled thereto, as required by the terms and provisions of said deed; that said bonds were taken by the parties to whom they were delivered for value, in the regular course of business, before maturity, and are now owned and held by them, or by their assigns or legal representatives, except as to the first instalment thereof, which fell due in December, A. D. 1892, and was paid, together with the interest then accrued and due on all of said bonds. The next instalment of said bonded indebtedness, which became due in December, A. D. 1893, was not paid at maturity, nor was the interest then falling due paid, nor have either of said sums or any part of them been since paid or satisfied by the defendants to
120 this cause, or either of them. It is admitted, further, that said bonds have not been paid, unless by the alleged sale made by complainant in the attempted exercise of its power as trustee under the power in said deed of trust contained, the legal effect of which sale and whether the same operated as payment or not in respect to any of said bonds, and, if so, to what extent, are questions to be determined by the court, and in respect to which no admissions are made.

B. F. LEIGHTON,
*Solicitor for Complainant.*
CALDERON CARLISLE,
*Solicitor for Defendants.*

EXHIBIT J. A. L. NO. 10—STIPULATION AS TO PAYMENT OF AMOUNT OF INSURANCE POLICIES TO W. G. JOHNSON.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, Complainant,
*vs.*
THE AMERICAN ICE COMPANY *et al.*, Defendants.
No. 17259. In Equity.

The complainant in the above-entitled cause and the defendants, The American Ice Company, Wm. G. Johnson, assignee, and Edward M. Willis, hereby mutually stipulate and agree as follows:

121 First. The complainant hereby agrees that the money due from the Corcoran Fire Insurance Company of the District of Columbia, the Lincoln Fire Insurance Company of the District of Columbia, and the Riggs Fire Insurance Company on account of the loss and destruction by fire of the property described in com-

plainant's bill, under certain policies issued by said companies unto the defendant William G. Johnson, assignee, shall be immediately paid unto the said Johnson, assignee, in accordance with the terms and provisions of said policies, and that it will immediately notify the said companies that it consents to such payment. The complainant is induced to withdraw its opposition to such payment because of the answers filed by said companies and the possible defenses that are suggested therein to enforcing the loss accruing under said policies and upon the understanding and agreement below entered into by the said defendant, William G. Johnson.

Second. And the said William G. Johnson, in consideration of the premises aforesaid, hereby stipulates and agrees that as soon as the said complainant notifies the said companies of its consent to the payment of the losses which have accrued upon said policies to him that he will immediately use his best endeavors to collect the same from said companies, and that the money when so collected he hereby agrees to hold in trust, to abide the event of this suit and the final order or decree of the court in the premises, and that he will pay the same to the complainant or its attorney of record upon the final determination of the court.

122 It is mutually understood and agreed that the payment of the moneys by the said companies to the said Johnson shall not in any way affect the rights of the parties in this cause thereto, but that the litigation shall continue until the final decree is had determining the rights of the parties to this cause to said moneys or funds.

In witness whereof said parties have hereunto signed their respective names.

EASTERN TRUST AND BANKING COMPANY,
By B. F. LEIGHTON, *Its Solicitor.*
WILLIAM G. JOHNSON,
*Assignee of the American Ice Company,*
By CALDERON CARLISLE, *Solicitor.*
WM. G. JOHNSON, *Assignee.*

*Decree for Sale—B. F. Leighton and C. Carlisle, Trustees, to Sell.*

Filed March 16, 1898.

In the Supreme Court of the District of Columbia

| | |
|---|---|
| EASTERN TRUST AND BANKING COMPANY *vs.* AMERICAN ICE COMPANY, WILLIAM G. Johnson, Assignee; Edward M. Willis, Corcoran Fire Insurance Company of the District of Columbia, Lincoln Fire Insurance Company of the District of Columbia, Riggs Fire Insurance Company. | Equity. No. 17259, Docket No. 40. |

123 This cause came on to be heard at this term of court on bill, answers, and depositions, and was argued by counsel;

upon consideration whereof it is this 16th day of March, A. D. 1898, adjudged, ordered, and decreed as follows, to wit:

First. It appearing to the court that the improvements on the real estate herein described were destroyed by fire before the filing of this bill, and that no rents or profits have accrued therefrom since the said filing of this bill, and the court being of opinion that the complainant is not entitled to any rents or profits accruing from said real estate prior to the filing of this bill, it is therefore adjudged, ordered, and decreed that the defendant William G. Johnson, assignee, be not required to account to complainant for any of the rents collected by him; and it appearing to the court that no income has accrued or is derivable from said real estate since the destruction by fire of the improvements prior to the filing of this bill, the prayer for a receiver is therefore denied.

Second. It is further adjudged, ordered, and decreed that the complainant is not entitled to any lien upon the money paid to said Johnson, assignee, by the Corcoran, Lincoln, and Riggs Fire Insurance Companies, and is not entitled to have the same to apply to the indebtedness secured by this deed of trust in these proceedings mentioned, and the prayers of the bill as to said fund are denied.

Third. It appearing to the satisfaction of the court that there is still due on account of the bonded indebtedness secured by
124 the said deed of trust or mortgage in these proceedings described the sum of twenty-one thousand three hundred and fifty dollars ($21,350), with interest thereon from the second day of December, 1892, it is therefore adjudged, ordered, and decreed that the complainant, The Eastern Trust and Banking Company, as trustee under said mortgage or deed of trust in these proceedings described, is entitled to have the same foreclosed, and to have the real estate therein described sold for the purpose of paying the balance due on the bonded indebtedness secured by said deed of trust, and Benjamin F. Leighton and Calderon Carlisle are appointed as trustees to sell all the right, title, and interest of the parties to this cause in and to all that certain piece, parcel, and lot of real estate situate in the city of Washington, District of Columbia, more particularly described as follows, to wit:

All that piece or parcel of land, with the improvements thereon, lying in the city of Washington, in the District of Columbia, and being opposite square two hundred and seventy (270), running thence southerly with the west line of Thirteen street to the channel of the Potomac river; thence westerly with said channel to a point opposite the southwest corner of said square numbered two hundred and seventy; thence due north to the said southwest corner of said square two hundred and seventy, following the eastern line of what is alleged to be Thirteen-and-a-half street; thence with the southern line of said square two hundred and seventy two hundred and fifty-five (255) feet one (1) inch to the place of
125 beginning, together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining, and all the remainders,

reversions, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand, either at law or in equity or otherwise however, of the said parties to this cause.

And the course and manner of their proceeding shall be as follows: They shall first give a bond, to be approved by the court, in the sum of five thousand dollars, conditioned for the faithful performance of their duties as such trustees, and shall give at least ten days' previous notice in one or more daily newspapers published in the city of Washington, in said District, and such other notice as they may think proper, of the time, place, manner, and terms of sale; which terms of sale shall be as follows, to wit: One-third of the purchase-money in cash, and the balance in two equal instalments at one and two years, secured by the notes of the purchaser or purchasers, with interest thereon from the date of sale, and a good and valid deed of trust, to the satisfaction of the trustees, on the property sold, or all cash, at purchaser's option; and as soon as may be convenient after such sale or sales the trustees shall return to this court a full and particular account of the same, with an affidavit of the truth thereof, and the fairness of such sale or sales, annexed; and upon full compliance by the purchaser or purchasers with the terms of sale, and upon the final ratification of such sale or sales by the court, and not before, the said trustees by good and sufficient deed, to be executed and acknowledged in conformity to law, shall convey to the purchaser or purchasers of said property, and
126 to his, her, or their heirs, the property to him, her, or them sold free, clear, and discharged of all claim of the parties to this cause, or of any person or persons claiming by, from, or under them; and the said trustee shall account to this court for the money arising from such sale or sales, and the notes which may be taken for the same shall be disposed of under the direction thereof, after deducting therefrom the costs of this suit and such commission to the trustees as the court shall see proper to allow in consideration of the care, skill, and fidelity with which they shall appear to have discharged the trust.

By the court: W. S. COX, *J.*

From the first and second paragraphs of said decree the complainants in open court, at the time of the signing thereof, appeals to the Court of Appeals, and the defendant- American Ice Company and William G. Johnson, assignee of the American Ice Company, in open court and at the time of signing said decree, appeal from the third paragraph of said decree to the Court of Appeals, complainants to give bond on appeal in the penalty of five hundred ($500) dollars and the defendants who have appealed in like sum; or, in lieu thereof, each of said parties may deposit the sum of one hundred ($100) dollars in cash.

W. S. COX, *J.*

*Memoranda.*

March 28, 1898.—$100.00 deposited by complainants in lieu of appeal bond.

April 5, 1898.—$100.00 deposited by defendant Johnson in lieu of appeal bond.

127 *Stipulation as to Transcript of Record.*

Filed April 15, 1898.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, Complainant, *vs.* AMERICAN ICE COMPANY *et al.*, Defendants. } No. 17259. In Equity.

It is hereby stipulated and agreed by and between the complainant and the defendants American Ice Company and William G. Johnson, assignee, through their respective counsel, that in making up the transcript of the record on the appeals taken herein by said complainant and said defendants respectively the clerk shall copy and include therein the following papers, pleadings, and documents herein filed, and none other, to wit:

The original bill, with Exhibit "A" thereto annexed; the joint and several answer *to* the defendants American Ice Company and Edward M. Willis and the separate answers of the defendants William G. Johnson, assignee, and the Corcoran Fire Insurance Company of the District of Columbia; the deposition of George B. Canney, taken on behalf of complainant, with the exhibits therewith filed, excepting the notices of sale and adjournments thereof, being three newspapers clippings attached to said deposition; the residue of the testimony taken on behalf of complainant (no testimony having been taken on behalf of defendants), together with the exhibits filed therewith, excepting Exhibits "J. A. L.

128 Nos. 1, 2, 3, 4, 5, 6, 7, and 8" and the printed transcript of record referred to in Exhibit "J. A. L. No. 9" as "Complainant's Exhibit No. 2," which printed transcript is identical with Exhibit "A" filed with the original bill; the final decree, with the note as to the appeals therefrom; this stipulation of counsel.

And it is further stipulated and agreed by and between the complainant and said defendants, through their counsel, as aforesaid, that the defendants The Lincoln Fire Insurance Company of the District of Columbia, The Riggs Fire Insurance Company appeared herein and filed answers to the original bill in due course, the same in substance and effect as the aforesaid answer of the Corcoran Fire Insurance Company of the District of Columbia; that the complainant in due course filed general replication to the answers of each of the defendants in this cause; that before making answer to the said original bill the defendants American Ice Company, William G. Johnson, assignee, and Edward M. Willis interposed a general demurrer thereto, and that the same was, upon hearing, overruled, with leave to said defendants to answer; that a preliminary application for the appointment of a receiver to take possession of the property of the American Ice Company situate in the District of Columbia and receive the rents, issues, and profits thereof and apply the same under the direction of the court was made on behalf of complainant, was heard on affidavits filed in

support thereof and on other affidavits filed in opposition thereto, and was denied; that Exhibits "J. A. L. Nos. 1, 2, 3, 4, 5, 6, 6, and 8" tend to show, and it is hereby admitted to be the fact, that the complainant, as trustee under the deed of trust in the proceedings
129 mentioned, caused a notice of sale at public auction of the parcels of real estate, situate in Penobscot county, Maine, and in the District of Columbia, in said deed of trust described, together with the easements, rights, and appurtenances, to be inserted on April 11, 18, 25, May 2 and 9, 1894, in the Bangor Daily Whig and Courier, a daily newspaper printed and published in said county of Penobscot and State of Maine; on April 11, 18, 25, and May 2, 1894, in the Bangor Daily News, a daily newspaper published in said county and State; on April 7, 14, 21, 28, and May 5, 1894, in the Evening Star, a daily newspaper published in the city of Washington, District of Columbia, and on April 7, 14, 21, 28, and May 5, 1894, in the Washington Post, a daily newspaper published in said city of Washington, District of Columbia; that each of said notices of sale so published specified May 9th, 1894, at ten o'clock a. m., as the time and the Bangor house, in the city of Bangor, in the county of Penobscot and State of Maine, as the place at which said sale would be held, contained a proper reference to said deed of trust, with a recital of default thereunder, described the property to be sold substantially as the same is described in said deed of trust, and stated that the terms and conditions of the sale would be announced at the time of sale, and that the trustee reserved the right to adjourn such sale or sales under the authority conferred by said deed of trust; that complainant thereafter gave notice, as trustee as aforesaid, by advertisement inserted in said Bangor Daily Whig and Courier on May 25, June 1, and June 8, 1894, and in said Washington Post on May 22, 29, and June 5, 1894, that the said sale as theretofore advertised to occur on the 9th day of May, 1894,
130 was adjourned to Friday, June 8th, 1894, at 11 o'clock a. m., at the same place, and that complainant, as trustee, as aforesaid, thereafter gave notice, by advertisement inserted in said Bangor Daily News on September 1st and 8th, 1894, and in said Evening Star (of Washington) on August 29th and September 5th, 1894, that said adjourned sale had been adjourned or postponed to Saturday, September 8th, 1894, at eleven o'clock a. m., at the same place, at which time and place the aforesaid real estate and appurtenances of the American Ice Company, situate in Penobscot county, Maine, and in the District of Columbia, would be sold at public auction under said deed of trust.

Witness the signatures of said parties, by their respective counsel, this fifteenth day of April, A. D. 1898.

EASTERN TRUST AND BANKING COMPANY, *Complainant*,
By B. F. LEIGHTON,
G. FRANCIS WILLIAMS,
*Its Solicitors.*

CARLISLE & JOHNSON,
*For American Ice Company, Wm. G. Johnson, Assignee.*

131 UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 131, inclusive, are true copies of originals in equity cause No. 17259, wherein The Eastern Trust and Banking Company are complainants and The American Ice Company *et al.* are defendants, as the same remain upon the files and records of this court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 3d day of May, A. D. 1898.

JOHN R. YOUNG,
*Clerk Supreme Court, District of Columbia.*

Endorsed on cover: District of Columbia supreme court. No. 800: Eastern Trust and Banking Company, appellant, *vs.* American Ice Company *et al.;* and No. 801: American Ice Company *et al.*, appellants, *vs* Eastern Trust and Banking Company. Court of Appeals, District of Columbia. Filed May 5, 1898. Robert Willett, clerk.

80 *Depositions for Complainant.*

Filed September 22, 1899.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, Plaintiff,
*vs.*
AMERICAN ICE COMPANY ET ALS., Defendants. } No. 17259.

Be it remembered that on this 29th day of August, 1899, personally appeared before me, Matthew Laughlin, a notary public in and for the county of Penobscot and State of Maine, GEORGE B. CANNEY, as witness for the plaintiff in the above entitled cause, Eastern Trust and Banking Company, plaintiff, *vs.* American Ice Company *et als.*, defendants; Charles A. Bailey and Benjamin F. Leighton, of counsel for the plaintiff, and William G. Johnson, counsel for the defendants Willis and The American Ice Company; and the said witness, being first duly sworn, did depose and say, in response to the direct and cross interrogatories to him propounded by the said counsel, as follows:

Direct examination.

By Mr. LEIGHTON:

Q. Mr. Canney, you have already been a witness once in this case and testified? A. I have.

Q. Do you occupy the same position with respect to the Eastern Trust and Banking Company now that you did at the time
81 your former deposition was taken? A. I do.

Q. You at that time testified that the property covered by the deed of trust in controversy in this case, situated in Hampden, in this State, sold for $14,000. That is correct, is it? A. That is correct.

Q. I ask you what became of that money, what disposition was made of it by the Eastern Trust and Banking Company—that $14,000. A. Well, there wasn't any money paid in. The sale was to the bondholders—to the committee of the bondholders.

Q. And the money was actually paid to them and was finally deposited by them with the Eastern Trust and Banking Company at the second sale, was it? A. Well, there was no money paid in.

Q. At the first sale? A. At the first sale; no.

Q. The sale in September of '94 there was no money paid in? A. No.

Q. When was the money paid in for this sale? A. There was money paid in to us by the bondholders' committee, the money they received when they sold the property.

Q. At what time? A. In '97, I think—March, '97—when they sold the property to the Consolidated Ice Company.

Q. What services were rendered by the Eastern Trust and Banking Company as trustee in respect to this property covered by the trust, and what did they do? A. Well, originally we cer-
82 tified the bonds, for which we received our pay, compensation; that was the original transaction. After that there was no compensation; we were to receive none unless we had to take some action when there had been a default or something whereby we had to taken action, then the mortgage recited, I think, we were to receive a reasonable compensation for our services. Of course, there was nothing until the default; but this compensation we did receive was for looking after insurance and taxes, and in a general way what any trust involves after default had been made

Q. Prior to this sale, what you characterize as the first sale, the sale that took place in September of '94—had you at that time incurred any liability on account of the trust? A. Nothing except what we had paid out for insurance between the time they failed——

Q. That is what I want to know. Had you incurred any liabilities? And, if so, state what they were. A. The liabilities were for money we had disbursed for taxes and insurance and to keep the property in shape prior to the sale. That was the request of the bondholders, I think, in addition to what our obligation would be anyhow as a trustee.

Q. Have you got the vouchers for the disbursements made by you on that account? A. I have.

Q. Will you kindly produce them? A. I have the vouchers for the items as appearing in that statement (producing them).

Q. I will hand you a statement purporting to be statement
83 of account of your trust with the American Ice Company and ask you to examine it and state whether that is a correct statement of account between the Eastern Trust and Banking Company and the American Ice Company. A. I should say it was.

Q. Were those moneys for which you claim credit there actually disbursed, except the $700, by you? A. They were.

Q. And for the purposes designated in that paper? A. They were.

Mr. LEIGHTON: If you have no objections, I will offer that in evidence.

Mr. JOHNSON: Yes; I object to it.

Mr. LEIGHTON: I will offer it in evidence.

(Paper marked "G. B. C. No. 1.")

Q. Mr. Canney, have you the vouchers representing the disbursements made by you for all of these items for which you claim credit, except the item of $700, mentioned in this memoranda? A. I have.

Q. You will please produce them. (Witness does so.)

(Vouchers produced were marked as follows: "G. B. C. No. 2," "G. B. C. No. 3," "G. B. C. No. 4," "G. B. C. No. 5," "G. B. C. No. 6," "G. B. C. No. 7," "G. B. C. No. 8," "G. B. C. No. 9," "G. B. C. No. 10," "G. B. C. No. 11," "G. B. C. No. 12," "G. B. C. No. 13," "G. B. C. No.

14," "G. B. C. No. 15," "G. B. C. No. 16," "G. B. C. No. 17," "G. B. C. No. 18," "G. B. C. No. 19," "G. B. C. No. 20," "G. B. C. No. 21," "G. B. C. No. 22," "G. B. C. No. 23," "G. B. C. No. 24," "G. B. C. No. 25," "G. B. C. No. 26.")

84 Q. Were the several sums mentioned in those vouchers which you have filed actually paid and disbursed by you—by the Eastern Trust and Banking Company—in accordance with those vouchers? A. They were.

Q. A few of those items, I observe, two of them, were paid after the date of the sale. One was paid February 13, 1895, and another November 1st, 1895; one was for Mr. Pearl, auctioneer, and the other was to Davis and Bailey, as attorneys, $50. A. Well, they were for services rendered prior to the sale.

Q. Was this auctioneer the auctioneer that cried the sales? A. He was.

Q. And the money disbursed was on account of that service? A. It was; yes.

Q. Your last item in this memoranda is for $700, trustees' services. State what service was rendered for which that charge was made. A. Well, it would be the general service of a trustee; in this specific case it was for disbursing the money, paying the bills, looking after insurance and taxes, and the sale, and the general service of a trustee.

Q. Including your commissions as trustee for the sale of September 8, 1894? A. Yes; the first sale.

85 Q. State whether or not that charge is a fair and reasonable one for the services actually rendered by the company. A. I should say it was. We talked it over carefully and we concluded that was a reasonable compensation for the services rendered.

Q. It is on a basis, I notice, of 5 per cent. of the amount of the sale, the amount for which the property sold in this jurisdiction? A. Yes.

Q. Were any services rendered by the trust company in its quality of trustee in respect to the Washington property, the property situated in Washington? A. Yes.

Q. Of what did those services consist? A. Well, one was, perhaps, a trip I took to Washington to get the standing of the case there and see what method was best to adopt to protect the bondholders.

Q. What are your duties as an officer of the complainant in respect to their keeping of their accounts and supervision of their accounts? A. Well, my position is secretary. The treasurer really is the book-keeper, makes the entries probably most of the time—the actual entries on the book—but, of course, in a small bank as we are we all of us do more or less. If he should happen to be away, why, of course, I take the charge and keep the books and do his work while he is away, which he is at present, but when he is here of course his duty as treasurer——

Q. Who is your treasurer? A. Dr. Charles D. Crosby.

86 Q. Is he in the jurisdiction or out of it at present? A. I don't know what you mean, exactly, by jurisdiction. He is away on a vacation now.

Q. Not in the city? A. No.

Q. Have you the books of original entry in respect to these items of disbursement? A. I have.

Q. Will you produce it, please? I don't know but Mr. Johnson would like to see it. A. Unless you actually want it, it is quite a job. It runs way back. It will take some time to hunt them up. Of course, if you want it, I will produce it, but it will take some time to hunt them up. Those entries all appear on the cash book because they have to in the settling of the cash, of course.

Q. Do you know whether they appear in different cash books? A. No; we only have one cash book.

Q. But the items, you mean, are different pages, different points, of course, paid at different times; is that what you mean? A. Yes.

(Cash book produced.)

Q. It appears by the record that the sale made by the bondholders some time in March of '97—that the title to this property was held by the trust company between those dates. Is that so? A. There had never been any title passed. We held it.

Q. After the sale of September 8, 1894? A. It had never been deeded up to the time of the sale in '97.

87 Q. And you never up to the date of this second sale had received any actual money; no money had been paid to you by the purchasers of the property? A. Not by the purchasers; no.

Q. The purchase-money for the sale of September 8 was paid at the time of the second sale, was it? This $14,000 was paid at the date of the second sale or about that time? A. Well, I presume it was included in that, you know.

Q. I see the balance you ascertain to have been actually paid—the net balance that was realized from this sale of September 8—was $11,775.33. That is the correct balance, is it? A. It is.

Q. How was that balance disposed of by you—by the trust company? Was it paid on account of the bonds or how was it disposed of? A. Well, that would come into the money that we received, of course, from the Consolidated Ice Company. When the disbursement was made it was made from the funds received from the Consolidated Ice Company.

Q. And that money was paid by you on account of the bonds? A. That was included in money that was paid, making the dividend which we did on the bonds.

Q. Have you got a list of the bondholders? A. I have.

Q. Are you able to produce it? A. Yes; I have it here.

(List produced.)

88 Q. Is that a correct list of the bondholders? A. It is.

Q. With the number of bonds which they hold? A. It is. It is the list we paid the dividend on.

Q. Have you the addresses of these parties? A. Yes.

Q. Can you furnish them as a part of your deposition? A. Yes; I think so.

Mr. LEIGHTON: I offer list of bondholders in evidence.

(Paper containing list of bondholders marked "G. B. C. No. 27.")

Counsel stipulate and agree that the stenographer may incorporate a copy of this paper, list of bondholders, Exhibit "G. B. C. No. 27," and return the original to the witness.

Cross-examination.

By Mr. JOHNSON:

Q. Mr. Canney, in this list of bondholders, dated March 18, 1897, which you have filed, there appears opposite the name Public Works Company the signature, "Public Works, James H. Cutler, trustee." Is that gentleman a representative of the Public Works Company? A. He is.

Q. Is that the genuine signature of that person? A. It is.

Q. I also observe the signature of T. J. Stewart & Co. opposite their name. Is that their genuine signature? A. It is.

Q. Are all these signatures opposite the names to which they relate the genuine signatures of those persons? A. They are.

89 Q. This in reality is a receipt from those persons for those payments? A. That is what it is.

Q. Now, I notice opposite a number of the other names the words "receipt" written. Does that mean that the company holds a separate receipt not written on this particular paper? A. It does. The parties were out of town, I presume. We have the receipts.

Q. So that in those cases where the parties were accessible you had them receipt on this paper? A. We did.

Q. In the other cases where the word "receipt" is written you hold their separate receipt for that, do you say? A. We do.

Q. Were they furnished with a statement showing how this dividend was arrived at? A. I don't recollect now as to that. Any inquiries asked, we, of course, gave them all the information we had

Q. Were any of the parties advised as to how this dividend was arrived at? A. Well, I don't recollect, I am sure. That was the dividend authorized by a committee of the bondholders—that dividend in this document we have here. That settlement was authorized and I don't know whether we furnished them. I presume when we paid them we stated it was a dividend of certain per cent. on the amount of money received from the sale of property.

90 Q. They actually received those amounts? A. They did. That dividend was authorized by the committee of the bondholders by a statement from them which I have here.

Q. Will you let me see that?

(Paper produced.)

Q. This paper, then, is the authority upon which the trust company made the dividend to the bondholders? A. Yes.

Mr. JOHNSON: I would like to have this go in evidence as part of the witness's cross-examination.

(Paper marked "G. B. C. No. 28.")

Counsel stipulate and agree that the stenographer may incorporate a copy of this paper, "Exhibit G. B. C. No. 28," and return the original to the witness.

Q. Mr. Canney, when you testified before in this case you annexed to your deposition, among other things, what was marked "Complainant's Exhibit No. 1," a paper signed by Edward L. Stewart, J. B. Huckins, John Miller, and dated Bangor, September 8, 1894, as being the terms of sale at which the property was offered in September, 1894. Will you look at it for the purpose of refreshing your recollection and state if that is correct (showing witness printed case). A. I presume it is correct if it appears there as it is in the document.

Q. You stated that "Exhibit G. B. C. No. 1," containing certain items taken from the cash book of your company, is a correct transcript of items appearing in that book. A. It is.

91 Q. Are those all the items appearing in the books of this company relating to the transaction between the company and the American Ice Company? A. I think so, including the first sale, up to the time of the first sale.

Q. Are those all the items that appear on your books? A. Up to the time of the first sale?

Q. At any time. A. Well, of course, we had some expense after the first sale, up to and including the time we sold it to the bondholders; that is all the items that appear that we charged them with, up to November 1st, '95, is the last item on here. That, I explained before, referred to bills that we contracted previous to the sale, only it was not paid until afterwards.

Q. Have your books any other items relating to the business between the Eastern Trust and Banking Company and the American Ice Company? A. I don't think they have.

Q. No items at all? A. Not up to the time of the first sale.

Q. Have they any items since that time? A. I don't recollect, I am sure.

Q. Do you know? A. I presume they have; we paid our money after that.

Q. Did you receive any money after that? A. O, yes; we received money.

Q. Does that appear on the books? A. Yes.

Q. Does it appear on your books what you received? A. Certainly.

Q. When you received it? A. Certainly.

92 Q. From what source? A. Certainly.

Q. And for what purpose? A. Certainly.

Q. Does it appear on your books what disposition was made of it? A. Certainly.

Q. Does it appear on your books what, if any, charges the company made against the ice company? A. Certainly.

Q. Does it appear for what those charges were? A. Certainly.

Q. And when they were made? A. Exactly.

Q. Now, do the books of the company show every receipt of money and every disbursement of money relating to the transactions between the American Ice Company and the Eastern Trust and Banking Company? A. They do.

Q. Can you furnish a transcript of all the entries that appear on your books? A. I can.

Q. Will you do so? A. It will take time to do so.

Q. Well, of course, I don't mean instantly, but to be attached as a part of your deposition? A. Certainly we can furnish a transcript of the books. Every item of money we have paid out or received in regard to the American Ice Company appears on the books, but we will have to hunt them up.

93 Mr. JOHNSON: I mean all entries on the books of the Eastern Trust and Banking Company concerning the American Ice Company from the 13th of October, 1893, the date of its assignment, to date—a full transcript of all entries.

(Paper annexed, marked "G. B. C. No. 29.")

Q. You know Mr. John Miller, do you not? A. I do.

Q. Mr. Miller stated in his deposition in this cause that the Eastern Trust and Banking Company made a statement of the amount of rents they had received and all the income they had received from the property, and showed the bills they had paid, and gave the property credit for $16,500 received from the Consolidated Ice Company of New York, $4,800 rent received from the Penobscot River Ice Company for the two years they had it rented. Is that correct? A. I think it is $2,400. I think Mr. Miller is wrong in that. It was only rented for one season. Upon examination I find Mr. Miller was right. It was $4,800, 2 years' rent.

Q. Did you give them a statement of account? A. We did when we settled with them; yes, sir.

Q. Did the company retain any copy of that statement? A. I think they did. I think it is this statement here that I produced this morning.

Q. You mean this statement dated March 12, '97, and signed by Messrs. Miller, Huckins, and Stewart? A. No; it is not included in this statement.

Q. Are you able to determine from anything in your possession whether or not the company retained a copy of the statement to which Mr. Miller referred? A. No; I do not know that they did.

Q. Will you search for such a copy and, if you find it, annex
94 it to your deposition? A. I will.

Q. Do you recall, as matter of fact, that a statement of that character was made up? A. Oh, yes; we went over it. All the committee were here and we went over the whole transaction and arrived at that statement, and I produced vouchers for all money paid out and all money that we had received.

Q. What is your recollection as to whether that statement was an

oral statement or a statement of account? A. I think it was an oral statement, and the vouchers produced—well, it couldn't have been an oral statement, perhaps, because I had to have some statement in order to compare with the vouchers, you know; but it has been so long that it has gone from my mind now just how we did settle it.

Q. If such a statement was made, was it made up by yourself? A. Yes; it would be. Yes.

Q. So that if there is copy in the company's papers you would have no difficulty in finding it? A. No.

Q. Now, you have referred frequently to a committee of bondholders. What personal knowledge have you as to those persons being a committee of the bondholders having authority in the premises? A. We have the original appointment of them and their signatures under seal that they are a committee appointed by the bondholders at such a time.

Q. Whose signatures? A. Mr. Stewart, Mr. Field, I think Mr. Huckins, whoever the committee was.

95 Q. Have you that paper here? A. I could produce it; yes. (Paper produced.)

Q. This paper is a copy of the original paper exhibited to you as the authority of the committee? A. I believe it so states.

Q. Did you ever see the original? A. I don't recollect now whether the original was showed us or not. I presume we did, though.

Q. That is the only paper that you have? A. Well, that is the original one. We have got some others here. I haven't had a chance to look them over. I don't know where they are.

Q. This is the paper you referred to as the authority? A. Yes; that is the paper I referred to.

(Paper offered in evidence and marked "G. B. C. No. 30.")

(Counsel stipulate and agree that the stenographer may incorporate a copy of this paper, Exhibit "G. B. C. No. 30," and return the original to the witness.)

Q. Now, Mr. Canney, do you remember when the trust company took physical possession of the property in Maine? A. I don't have it in my mind.

Q. Would the entries on the book show? A. I think I could find out.

Q. Can you approximate it from memory? A. I cannot, but I think it would be shortly after the assignment.

Q. Can you state whether it was before or after the offer and sale in September, '94? A. Oh, it was before.

96 Q. Before? A. Oh, certainly.

Q. Can you state when you gave up the possession of it? A. Well, I don't suppose we gave up the possession of it until the deed was passed to the Consolidated Ice Company—that is, we acted as agent after the property was sold first to the bondholders, and between that time and the time they sold it we acted as agent for them.

Q. And when you made the actual conveyance to the Consolidated Ice Company, then, of course, you gave up possession? A. Certainly.

Q. Since then you have had nothing to do with the property? A. No.

Q. Mr. Canney, in "G. B. C. No. 1" you have an item under date of March 23, 1893, "Edwards and Barnard, attorneys, $25." Do you remember what that was for? A. That was for advice.

Q. In connection with what? A. In connection with the taking possession of the property in Washington.

Q. In execution of the mortgage? A. Yes.

Q. Then, on July 1, '94, you have a similar charge to the same gentleman. Do you remember what that was for? A. That was in the same connection, further advice.

Q. In connection with that same matter of gaining possession? A. Yes.

97 Q. Well, on November 1st, '95, you have a memorandum of charge to Messrs. Davis and Bailey, attorneys, $50. Do you remember what that was for? A. That was for their advice at this end—our attorneys on this end.

Q. That was after litigation had commenced? A. Yes.

Q. Has that dividend of 39 per cent. been actually paid by you and received by all of the bondholders? A. It has.

Q. There is none of it outstanding and unpaid at this time? A. No; not that I know of.

Q. I notice in this statement for the distribution of the fund, dated March 12, 1897, there is an item for compensation to be retained by the trust company of $1,375. Is that inclusive or exclusive of the $700 appearing in Exhibit "G. B. C. No. 1"? A. That is inclusive.

Q. It is $675 additional. Then, can you state for what services that $675 was allowed? A. The same as the other, for trustee services. We continued to look after it from the date of the first sale to the date of the last sale.

Q. In this statement I also find this paragraph: "Amount to be paid to Penobscot Ice Company, to be divided by them between the ice and tools, they making a satisfactory agreement with the assignee of the unsecured creditors of the American Ice Company as to amount to be paid for tools, $3,500." Do you know who was

98 referred to there as the assignee of the American Ice Company? A. I think it was B. C. Additon. My recollection is that he was the assignee.

Q. There is also this item: "For balance of money paid out by yourself for taxes, insurance, and repairs to February 27th, 1897, including amount to be charged to real estate by order of court (1,051.42), $921.35." Does that 1,051.42 refer to a credit on a note held by the trust company of the American Ice Company on which suit was brought in Washington? A. It does.

Q. Is the ice referred to in this statement the same ice which was in the ice-house at the time of the assignment? A. No; I think

not. This is from recollection; I don't know anything about it, because that statement—that money was brought to us by the bondholders and deposited with us, and we made that statement up for their benefit. Now, in regard to that ice I don't know. I haven't any personal knowledge at all, whatever; don't know whether that is the same ice or not. When that statement was made we were acting as agent; we were not acting as trustees.

Q. Had the account of the foreclosure and mortgage been settled and paid before this statement was made? A. Well, the money was paid in to us when the property was sold to the Consolidated Ice Company; that money was paid in,

Q. But before that money? A. There was no money paid in.

Q. Nothing had been paid to the company? A. No.

99 Q. On account of the sale? A. No.

Redirect:

Q. Mr. Canney, you stated that the Eastern Trust and Banking—took possession of this property in the State of Maine covered by the trust prior to the sale of September 8, 1894; are you able to fix the date? A. It was prior to the first announcement, which was in May. It was advertised first in May, '94, I think. We had possession of it immediately after the failure of the company, which, I think, was in '93. Of course, I would have to refresh my memory by data somehow. We didn't allow it to run along any length of time after the assignment before we took possession; that wouldn't be business.

Q. Then your entry was for the purpose of taking possession under the power embraced in the deed of trust and for the purpose of sale? A. Certainly.

Q. Did you collect any rents or was any revenue derived from the American Ice Company from the date you took possession up to the time of the first sale—that is, the sale of September 8? A. From the American Ice Company?

Q. Yes, sir. A. No, sir.

Q. You simply were in possession as care-takers and to preserve the property and protect it pending the sale, was that it, under the foreclosure? A. That is it.

Q. What disposition did you make of the property after the

100 first sale—that is, was it leased or rented, or how? A. Yes; it was leased at the request of the bondholders. It was leased to the Penobscot Ice Company.

Q. For what time and for what rent? A. For one season; for $2,400 rental for the season.

Q. Was it rented for any longer time than that? A. No.

Q. Then all the money that you derived after the first sale from the rent was $2,400? Is that so? A. Yes; that is my recollection; of course, the books will show; but it is very clear to me.

Q. If your recollection is in error about that, you will correct it in your statement? A. Certainly.

Q. But your recollection—— A. Is that it was only rented for one season for $2,400.

Q. And thereafter it was unrented until the date of the second sale? A. Yes.

Q. Well, do you recollect the date when the receiver was appointed for this property? A. No; I do not.

Q. Do you know who made up the statement dated the 12th of March, 1897? A. I made it up.

Q. Where did you get the data or information upon which it was made? A. From the books of the company.

Q. It appears by this statement that the sum of $20,000 was paid to you. By whom was that paid? A. My recollection — it was paid by the Consolidated Ice Company; the transaction was completed here and they paid the money over to us.

101 Q. Do you recollect who was present at the time the transaction was closed with the Consolidated Ice Company? Were the representatives of the bondholders—Stewart, Miller, or either of them? A. I do not know. I presume they were both here, but I don't recollect.

Q. You have got an item here of $352.92, return premium? A. The policies were cancelled that were taken out under the American Ice Company, the bondholders, and when the title changed the policies were cancelled.

Q. It seems that there was an item here of $3,500 that was derived from the sale of ice and tools upon some agreement with the creditors, the assignee of the creditors of the American Ice Company; that was the Maine assignee, was it? A. Yes.

Q. Do you know whether or not the American Ice Company was indebted to the citizens of Maine at the time of its failure? A. Oh, yes; there were Maine creditors.

Q. And do you know under what authority or by whom that assignee was appointed? A. No; I do not.

Q. Don't know whether there was an assignment made of the American Ice Company or whether it was under the State insolvent law that the assignee was appointed? A. Couldn't say.

Q. The sale of the ice and tools seems to have been made
102 by his authority or with his consent? A. I presume so. That we knew nothing about; wasn't interested in. We have business enough without running after outside transactions.

Recross:

Q. Mr. Canney, in this settlement of March 12, 1897, which you state you made up, I suppose there was included to the trust company all charges that it made for insurance, taxes, or other expense between the time of the sale, in September, 1894, and the date of this settlement? A. That included everything, I think, that comes in there—that balance of expense. I think that balance of expense is the difference of what we had received for this rental and what we had paid out.

Q. And that squared all the obligations to the trust company? A. That squared all the obligations up to that time.

GEO. B. CANNEY.

And also appeared BENNING C. ADDITON as a witness for the plaintiff, and the said witness, being first duly sworn, did depose and say, in response to the direct and cross interrogatories propounded by the counsel, as follows:

Direct examination.

103 By Mr. LEIGHTON:

Q. You may state your full name. A. Benning C. Additon.

Q. What is your occupation? A. I am a lawyer.

Q. A member of the—— A. Penobscot bar.

Q. Are you also a member of the highest court of the State? A. I am a member of the circuit court bar of the United States.

Q. How long have you been an attorney? A. Thirty years.

Q. In practice that length of time? A. I was admitted in '70—twenty-nine years.

Q. Has the State an insolvent law—a law relating to insolvent debtors? A. It had prior to the passage of the last bankrupt law.

Q. Will you state what the provisions of that law were? A. I ought to have the statute here to do that. I wouldn't dare to state the statute.

Q. There was a State statute? A. Yes; chapter seventy, Revised Statutes of Maine.

It is hereby stipulated and agreed between counsel of the respective parties that the law relating to insolvent debtors, as found in the Revised Statutes of the State of Maine and amendments thereto, may be read in evidence without objection upon either side, so far as relevant to the issue here.

104 Q. Now state, Mr. Additon, whether you were the assignee of the American Ice Company under the insolvent-debtor law of this State. A. The judge of the insolvent court, Penobscot county, Maine, conveyed to me as assignee of the American Ice Company insolvent debtors, who were adjudged insolvent on petition of the creditors, all the estate, real and personal, of the said insolvent-debtor corporation, together with all deeds, books of account, and papers relating thereto, and including all the property of every kind of which it was possessed or which it was interested in or entitled to on the first day of February, A. D. 1894, except such property as by law is exempt from attachment and seizure on execution under the laws of Maine. This assignment was dated the 18th day of April, 1894.

Q. Did you qualify as assignee under the laws of the State? A. I qualified prior to the conveyance to me. I qualified as assignee under the laws of this State prior to the assignment to me by the insolvent court.

Q. Did you enter upon the duties of assignee under the law and under your assignment? A. I did.

Q. I will hand you exhibit dated March 12, 1897, which has already been offered in evidence. I find here a statement that the

amount to be paid to Penobscot Ice Company to be divided by them between the ice and tools, they making a satisfactory agreement with the assignee of the unsecured creditors of the American Ice Company as to amount to be paid for tools, $3,500. Do you recollect where that $3,500 came from, the sale of that ice—what
105 ice it was? A. That ice was—I feel quite sure it was ice that was in the ice-house remaining unsold at the time of the failure of the corporation, subject to mortgage or lien or pledge to the Eastern Trust and Banking Company. Prior to the petition in insolvency against the American Ice Company the assets of the American Ice Company were in the hands of the United States circuit court for this district, in the charge of a receiver, John R. Mason. This ice, I think, was ordered sold by the United States court, after notice and hearing, to pay the lien or pledge and the incidental expenses thereto, and I think was sold by the receiver, and notice was issued for a distribution of the assets, and the money was ordered distributed by the United States court.

Q. That ice was not sold by you as assignee? A. No.

Q. How about the tools? A. The tools were sold by me; the mortgage did not cover the tools; I sold the tools for $500.

Q. Did any other assets come into your hands as assignee except the tools? A. Not of any amount; a few dollars, perhaps; odds and ends, a few bills, something of that sort.

Cross-examination waived.

BENNING C. ADDITON.

106 And I hereby certify that the said depositions of the said witnesses were then and there taken down stenographically and afterwards read over to the said witnesses, and by them signed in accordance with the annexed stipulation of counsel.

I further certify that I am not of counsel for any of the parties in this litigation, and am not interested in the proceeding, and that my fee for taking the said depositions, amounting to seventeen $\frac{50}{100}$ dollars, has been paid by the plaintiff. Said sum of $17.50 includes the stenographer's fees and my own fees.

MATTHEW LAUGHLIN,

[SEAL.] *Notary Public in and for the County of Penobscot, State of Maine.*

107 "EXHIBIT G. B. C. No. 1."

Eastern Trust and Banking Company, Bangor, Maine, trustee, in account with American Ice Co. of Washington, D. C.

DR.

1894.
Sep. 9. To proceeds sale of Maine property..... $14,000.00

CR.

| | | | | |
|---|---|---|---|---|
| 1893. | | | | |
| Dec. | 20. | By paid insurance..... | $81.25 | |
| " | 27. | " " " ..... | 65.00 | |
| | 28. | " " " ..... | 65.00 | |
| | 30. | " " " ..... | 32.50 | |
| | 30. | " " " ..... | 93.00 | |
| 1894. | | | | |
| Jan. | 6. | " " " ..... | 158.99 | |
| | 15. | " " " ..... | 15.87 | |
| Feb. | 27. | " " taxes 1893..... | 317.90 | |
| M'ch | 27. | " " insurance..... | 27.00 | |
| | 23. | " " Edwards & Barnard, attorneys..... | 25.00 | |
| | | " " G. B. Canney, sect., expenses to Washington, D. C..... | 80.00 | |
| May | 8. | " " adv. sale, Dailey News, Bangor..... | 13.33 | |
| | 8. | " " adv. sale, Whig, Bangor.... | 10.00 | |
| | 8. | " " " " Washington Post. | 81.90 | |
| | 14. | " " " " " Star. | 83.98 | |
| | 9. | " " " C. P. Pearl, auctioneer. | 15.00 | |
| June | 8. | " " " " " " " . | 15.00 | |
| 108 | | | | |
| June | 8. | " " " adjourned sale..... | 1.75 | |
| | 19. | " " " Washington Post..... | 9.90 | |
| | 8. | " " room, Bangor house..... | 1.00 | |
| Sept. | 8. | " " " " " ..... | 1.00 | |
| | 29. | " " adv. adjourned sale, Bangor News..... | 3.50 | |
| July | 21. | " " Edwards & Barnard, attorneys..... | 25.00 | |
| Dec. | 7. | " " taxes 1894..... | 226.80 | |
| 1895. | | | | |
| Feb. | 13. | " " C. S. Pearl, auctioneer..... | 25.00 | |
| Nov. | 1. | " " Davis & Bailey, attorneys... | 50.00 | |
| | | " " trustees' services..... | 700.00 | |
| | | | | 2,224.67 |
| Balance..... | | | | $11,775.33 |

109 Copy.

"G. B. C. No. 2."

BANGOR, ME., *December 20th*, 1893.

Eastern Trust and Banking Company to D. M. Howard & Son, Dr.

For premium on policy # 225,075, Ins. Co. of North America, $2,500 on American Ice Co. ice-house at Hampden..... $81.25

Received payment,

D. M. HOWARD & SON.

Copy.

"G. B. C. No. 3."

BANGOR, ME., *Dec. 27th*, 1893.

Ea. Trust and Banking Co., city.

Sold premium on policy # 1,503,427, Fire Ass., American Ice Co., $2,000..... ..... $65.00

Paid.

TYLER FOGG & CO.

110 Copy.

"G. B. C. No. 4."

$65.00. BANGOR, *Dec. 28th*, 1893.

Received of Eastern Trust & Banking Company sixty-five dollars, being for premium on policies in the Ins. Co. State of Penn. and Granite State Ins. Co. to American Ice Co.

J. W. McCLURE.

Copy.

"G. B. C. No. 5."

J. H. Boyd & Co., general insurance.

BANGOR, ME., *December 30th*, 1893.

Eastern Trust & Banking Co., Dr.

To premiums.

| Policy. | Company. | Property. | |
|---|---|---|---|
| American Ice Co..... | Royal..... | Building..... | $32.50 |

Paid.

J. H. BOYD & CO.

111 Copy.

"G. B. C. No. 6."

BANGOR, ME., *Dec.* 26, 1893.

Eastern Trust & Banking Co. to W. F. Curran, Dr.

To insurance on American Ice Co.'s buildings, Atlas Mutual pol. # 4457..... $93

Paid Dec. 30, 1893.

W. F. CURRAN.

Copy.

"G. B. C. No. 7."

BANGOR, ME., *Jan'y 6th*, 1894.

American Ice Co. to A. M. Mason, Dr.

| | | |
|---|---|---|
| For Hanover policy # | 325,913..... | $48.75 |
| " " | 14..... | 24.37 |
| Springfield | 8705..... | 24.37 |
| Home | 8822..... | 61.50 |
| | | 158.99 |

Paid Jan'y 6, 1894.

ARTHUR M. MASON.

Paid by Eastern Trust & Banking Co.

ARTHUR M. MASON.

112 Copy.

"G. B. C. No. 8."

Eastern Trust & B'k'g Co. in account with Chas. S. Pearl.

Ledger folio 562.

DR.

| | | |
|---|---|---|
| 1893. | | |
| Aug. 3. Endorsement Imperial Nat'l pol's..... | 75 | |
| 1894. | | |
| Jan. 1. Pennsylvania pol. # 139,087, Am. Ice Co.... | 32 50 | |
| | | $33.25 |

CONTRA. *Cr.*

| | |
|---|---|
| 1893. | |
| Nov. 23. By ret. prem. Fire Ass'n pol. 1,503,292..... ... | 17.38 |
| | $15.87 |

Paid Jan. 15, '94.

CHAS. S. PEARL.
TUCK.

Copy.

"G. B. C. No. 9."

HAMPDEN, ME., *Feb.* 26, 1894.

*Mr.* American Ice Co.:

Your State, county, and town tax in said town for the year 1893, as committed to me to collect, is now due, and which you are requested to pay, is $317.90.

The delivery of this bill is considered a legal demand.

A. A. SMITH, *Collector.*

Received payment Feb. 27, 1894, by the Eastern Trust and Banking Co.

A. A. SMITH, *Collector.*

113

Copy.

"G. B. C. No. 10."

BANGOR, ME., *Feb'y 23d*, 1894.

American Ice Co. to Arthur M. Mason, Dr.

For insurance as follows:

Feb'y 23. To Springfield policy No. 8748.... ..... $27.00

Paid by Eastern Trust & Banking Co.

ARTHUR M. MASON, *Ag't.*

Copy.

"G. B. C. No. 11."

$25.00. WASHINGTON, D. C., *March* 23, 1894.

Received of the Eastern Trust & Banking Company twenty-five dollars for examination of mortgage of American Ice Co. to said Co., in Lib. 1439, folio 417 *et seq.*, of land records, D. C., and opinion in writing and consultations.

EDWARDS & BARNARD.

114

Copy.

"G. B. C. No. 12."

$80. BANGOR, ME., *March 25th*, 1895.

Received of E. T. & B. Co. eighty dollars, expenses of trip to Washington, D. C., relating to American Ice Co. trust mortgage.

GEO. B. CANNEY, *Sec'y.*

Copy.

"G. B. C. No. 13."

BANGOR, ME., *May 8th*, 1894.

Eastern T. & B. Co. to Bangor Publishing Co., Dr.

10² inch adv't in Daily News, April 11, 18, 25, May 2, '94, American Ice Co..... ..... ..... 13.33

Paid May 8th.

BANGOR PUB. CO.,
P'r M. B. REED.

115

Copy.

"G. B. C. No. 14."

Eastern Trust & Banking Co. to Boutelle Brothers, publishers of the "Bangor Daily Whig and Courier" and "Bangor Weekly Courier," Dr.

1894.
April 11. Adj. trustee sale, 10 in., every Wed. 5 w..... .... 10.00

Paid.

BOUTELLE BROS.,
By J. KEARNS.

Copy.

"G. B. C. No. 15."

WASHINGTON, D. C., *May* 5, 1894.

Eastern Trust & Banking Co., trustees, Bangor, Me., to the Washington Post Company, Dr.

For advertising as follows:

1894.
April 7. Trustee sale estate of Amer'n Ice Co., 117 l., 1 a w, 5 ed..... ..... ..... $81.90

May 10, '94, received payment for company.

A. McCONNELL.

116 Copy.

"G. B. C. No. 16."

WASHINGTON, D. C., *May* 1, 1894

Eastern Trust & Banking Co. of Bangor to the Evening Star Newspaper Co., Dr.

L. f. 5.

1894.

April 7. Sale, 125 lines, 1 a w, 4 times..... ..... $70.31
May 5. " cont., 1 " .. .. ..... 13.67

$83.98

Paid May 16, 1894.

THE EVENING STAR NEWSPAPER COMPANY,
By J. — HERRON, *Cashier.*

Copy.

"G. B. C. No. 17."

$15. BANGOR, ME., *May 9th*, 1894.

Received of Eastern Trust & Banking Co. fifteen dollars for services as auctioneer at sale of American Ice Co.'s property this day.

CHAS. S. PEARL.

117 Copy.

"G. B. C. No. 18."

BANGOR, *June 8th*, 1894.

Received from Eastern Trust & Banking Company, trustees, fifteen dollars for services as auctioneer connected with sale of American Ice Co. property for ac. Eastern Trust & Banking Co., trustees.

$15. CHAS. S. PEARL.

Copy.

"G. B. C. No. 19."

BANGOR, ME., *June* 8, 1894.

Eastern Trust & Banking Co. to Boutelle Brothers, Dr., publishers of the "Bangor Daily Whig and Courier" and "Bangor Weekly Courier."

1894.

May 25. Adj. trustees' sale, 1¾ in., 3 ts..... $1.75

P'd.

BOUTELLE BROS.
KERR.

118 Copy.

"G. B. C. No. 20."

WASHINGTON, D. C., *May* 22, 1894.

Eastern Trust & Banking Company, Bangor, Me., to the Washington Post Company, Dr.

For advertising as follows:

1894.
May 22. Adjourned tr. sale, prop. Amer'n Ice Co., 22 l., 1 a w, 3 t. (May 22, 29, & June 5)..... $9.90

June 21, '94, received payment for company.
A. McCONNELL.

Copy.

"G. B. C. No. 21."

Debit Amer. Ice Co. foreclosure ac.

Room at Bangor house for auction sale..... 1
adjourned sale..... ..... 1
June 8, 1894. Sept. 8.

119 Copy.

"G. B. C. No. 22."

BANGOR, ME., *Sept.* 28, 1894.

Eastern Trust & Banking Co. to Bangor Publishing Co., Dr.

2-inch auction, adj., in daily, May 25, June 1 & 8... 2.00
" " sale, adj., in daily, Sept. 1–8..... 1.50
3.50

Paid Sept. 29.

BANGOR PUB. CO.,
P'r M. B. REED.

Copy.

"G. B. C. No. 23."

JULY 27, 1894.

The Eastern Trust & Banking Company to Edwards & Barnard, Dr.

To balance for professional services to date in matter of American Ice Company mortgage and attempted sale... $25.00

Rec'd payment Aug. 1, 1894.
EDWARDS & BARNARD.

120 Copy.

"G. B. C. No. 24."

HAMPDEN, ME., *Dec.* 7, 1894.

Received of American Ice Co. two hundred and twenty-six dollars and 80 cents in full for their State, county, and town tax for the year 1894.

A. A. SMITH, *Collector.*

Paid by the Eastern Trust and Banking Co.

Copy.

"G. B. C. No. 25."

BANGOR, ME., *Jan'y*, 1895.

Eastern Trust & Banking Co. in account with Chas. S. Pearl.

Ledger folio 562.

1894.

Sept. 8. To com's sale, Amer. Ice Co..... 25

Paid Feb'y 13, '95.

CHAS. S. PEARL.
TUCK.

121 Copy.

"G. B. C. No. 26."

BANGOR, *Nov.* 1, 1895.

Eastern Trust & Banking Co. to Davis & Bailey, Dr.

To services rendered to American Ice Co.'s mortgage and sales thereunder from March 13th, 1894, to this date.... $50.00

Rec'd pay't,

DAVIS & BAILEY.

122 Copy.

G. B. C. No. 27.

BANGOR, MAINE, *March 18th*, 1897.

Received of Eastern Trust and Banking Company, trustee, the amount opposite our name, being dividend of 39 per cent. of the par value of the American Ice Company bonds owned by us.

| Name. | Par value. | Dividend. | |
|---|---|---|---|
| Public Works Co. | $2,400 | $936 | March 25, 1897, applied on note. { Public Works. Jas. H. Cutler, treas. |
| T. J. Stewart & Co. | 3,200 | 1,248 | Applied on note M'ch 24, '97. T. J. Stewart & Co. |
| Same | 2,500 | 975 | Geo. F. Bryant, cash. O K. T. J. Stewart & Co. |
| J. H. Robinson | 800 | 312 | J. H. Robinson, by A. J. Robinson. |
| John A. Bacon | 1,900 | 741 | John A. Bacon. |
| Bacon & Robinson Co. | 200 | 78 | Bacon & Robinson Co., by A. J. Robinson, sec. |
| A. J. Robinson | 200 | 78 | A. J. Robinson. |
| J. B. Foster | 2,400 | 936 | J. B. Foster. |
| Chas. E. Field | 1,000 | 390 | Applied on note M'ch 20. C. E. Field. |
| Dora E. Field | 100 | 39 | Dora E. Field, by C. E. Field. |
| J. B. Huckins | 2,800 | 1,092 | Receipt. |
| Frank Huckins | 600 | 234 | Receipt. |
| Carrie F. Huckins | 800 | 312 | Receipt. |
| Harry Huckins | 200 | 78 | Receipt. |
| John Miller | 9,809 | 3,822 | Receipt. |
| Ann S. Lynch | 2,500 | 975 | Receipt. |
| Frances E. Spring | 2,000 | 780 | Receipt. |
| 123 Alice S. Talbot | 500 | 195 | Receipt. |
| Bernice Morse | 600 | 234 | Receipt. |
| Mrs. J. M. Dickey | 500 | 195 | Mrs. J. M. Dickey. |
| | 35000 | 13,650 | |
| | 39 | | |
| | 3150 | | |
| | 1050 | | |
| | 13650 | | |

124 Copy.

"G. B. C. No. 28."

BANGOR, *March 12th*, 1897.

To Eastern Trust and Banking Company:

The property of the American Ice Company, including tools and ice contained therein, has been sold to the Consolidated Ice Company of New York for $20,000 and the amount paid in to you ..... $20,000

You have also received from return premiums on insurance policies ..... 350.92

Making a total of ..... $20,350.92

From this amount you are hereby authorized and instructed to make the following disbursements:

| | | | |
|---|---|---|---|
| Amount to be paid to Penobscot Ice Company, to be divided by them between the ice and tools, they making a satisfactory agreement with the assignee of the unsecured creditors of the American Ice Company as to amount to be paid for tools... | $3,500 | | |
| For balance of money paid out by yourself for taxes, insurance, and repairs to Feb'y 27th, 1897, including amount to be charged to real estate by order of court (1,051.42). | 921.35 | | |
| For compensation to yourself for services to date ..... | 1,375 | | |
| For expense of John Miller ..... | 50 | R. | |
| " " " J. B. Huchins..... | 25 | R. | |
| " bill " B. C. Additon..... | 10 | R. | |
| " " " C. F. Woodard ..... | 130 | R. | |
| " " " C. E. Field, for sale, etc..... | 75 | R. | |
| 125 For bill of C. A. Bailey for services to date ..... | 27 | R. | |
| For bill of B. F. Leighton for services to date ..... | 300 | R. | |
| For amount to be retained for further expenses of litigation in Washington, D. C., as per advice of B. F. Leighton ..... | 200 | | |
| Total ..... | | | 6,613.35 |
| Leaving a balance of..... | | | 13,737.57 |
| Forward ..... | | | $13,737.57 |
| From this amount you will retain, to be used for further expenses if the same is needed..... | | | 87.57 |
| Leaving a balance of... | | | 13,650 |

From which you will make a dividend of 39 % on the face of the $35,000 outstanding bonds.

JOHN MILLER,
JOHN B. HUCKINS,
EDWARD L. STEWART,
*Bondholders' Committee.*

126 "G. B. C. No. 29.

No. 1.

*Transcript of Entries Relating to American Ice Company as They Appear upon Cash Book of Eastern Trust and Banking Company, Bangor, Maine.*

| | | | | |
|---|---|---|---|---|
| 1894. | | American Ice Co. foreclosure account: | | |
| Mar. | 22. | To taxes town of Hampden, 1893 | 317.90 | |
| | | Ins. on houses—Royal, J. H. B. & Co | 32.50 | Page 323 |
| | | North Amer., D. M. H | 81.25 | |
| | | Atlas, W. F. C | 93. | |
| Mar. | 28. | American Ice Co. foreclosure account: | | |
| | | To G. B. Canney, sec't'y, expenses to Washington | 80. | |
| | | Edwards and Barnard, examination of mortgage and opinion | 25. | Page 328 |
| Mar. | 29. | American Ice Co. foreclosure account: | | |
| | | To ins. on houses—Imperial | 33.25 | |
| | | Hanover 48.75 | | |
| | | 24.37 | | |
| | | | 73.12 | |
| | | Home | 61.50 | Page 329 |
| | | Springfield | 27.00 | |
| | | Fire Assoc | 65.00 | |
| | | State of Penn | 65.00 | |
| | | Springfield | 24.37 | |
| May | 8. | American Ice Co. foreclosure account: | | |
| | | To adv't sale—Washington Post | 81.90 | |
| | | " " Daily News | 13.33 | Page 378 |
| | | " " Whig | 10. | |
| May | 9. | American Ice Co. foreclosure account: | | |
| | | To paid S. S. Pearl, auctioneer | 15. | |
| | | " room, Bangor house | 1. | |
| May | 14. | American Ice Co. foreclosure account: | | |
| | | To adv't Washington Star | 83.98 | Page 385 |
| June | 8. | American Ice Co. foreclosure account: | | |
| | | Boutelle & Burr, adv't | 1.75 | |
| | | C. S. Pearl, auctioneer | 15. | Page 418 |
| | | Room for sale at Bangor house | 1. | |
| June | 19. | American Ice Co. foreclosure account: | | |
| | | To paid Washington Post, notice adjourned sale | 9.90 | Page 433 |
| 127 | | | | |
| July | 30. | American Ice Co. foreclosure account: | | |
| | | To Edwards and Barnard, legal services to date | 25. | Page 479 |
| | | New form of cash book, pages not numbered. | | |
| Sept. | 28. | American Ice Co. foreclosure account: | | |
| | | To adv't sale | 3.50 | 1,240.25 |
| Dec. | 6. | American Ice Co. foreclosure account: | | |
| | | To taxes, 1894 | 226.80 | |
| Dec. | 24. | American Ice Co. foreclosure account: | | |
| | | To insurance | 65.00 | |
| " | 24. | " " | 81.25 | |
| Dec. | 28. | American Ice Co. foreclosure account: | | |
| | | To expenses, receiver, etc | 1,051.42* | |
| Dec. | 29. | American Ice Co. foreclosure account: | | |
| | | To insurance, Curran | 97.50 | |
| | | " " B. B. & B | 65.00 | |
| | | " " Mason | 73.12 | |
| | | " " McClure | 65.00 | |

* Amount due Eastern Trust and Banking Company from proceeds of ice sold by receiver upon which trust company had a mortgage and ordered charged to the real estate by decree of U. S. district court.

| | | | | |
|---|---|---|---|---|
| 1895. | | | | |
| Jan'y | 8. | American Ice Co. foreclosure account: | | |
| | | To insurance, Mason | 73.12 | |
| Feb'y | 13. | American Ice Co. foreclosure account: | | |
| | | To C. S. Pearl, commission sale, Sept. 8 | 25.00 | |
| Aug. | 20. | American Ice Co. foreclosure account: | | |
| | | To J. W. Phillips, rent shore, 1893 | 50.00 | |
| Sept. | 20. | American Ice Co. foreclosure account: | | |
| | | To legal expenses, B. F. Leighton bill | 331.10 | |
| Oct. | 29. | American Ice Co. foreclosure account: | | |
| | | To insurance, T. F. & Co | 40.50 | |
| Nov. | 5. | American Ice Co. foreclosure account: | | |
| | | To insurance, J. W. McClure | 40.50 | |
| Nov. | 8. | American Ice Co. foreclosure account: | | |
| | | To Davis & Bailey | 50.00 | |
| Dec. | 13. | American Ice Co. foreclosure account: | | |
| | | To taxes | 135.00 | |
| Dec. | 21. | American Ice Co. foreclosure account: | | |
| | | To insurance | 73.12 | |
| Dec. | 24. | American Ice Co. foreclosure account: | | |
| | | To insurance | 65.80 | |
| " | 24. | " " | 58.50 | |
| 128 | | | | |
| Dec. | 27. | American Ice Co. foreclosure account: | | |
| | | To insurance | 87.75 | |
| Dec. | 30. | American Ice Co. foreclosure account: | | |
| | | Insurance | 58.50 | |
| 1896. | | | | |
| Jan'y | 6. | American Ice Co. foreclosure account: | | |
| | | Insurance | 65.81 | |
| Jan'y | 7. | American Ice Co. foreclosure account: | | |
| | | Insurance | 29.25 | |
| Jan'y | 27. | American Ice Co. foreclosure account: | | |
| | | Shore rent, Brewer | 50.00 | |
| | | | | 3,017.54 |
| | | | | 4,257.79 |
| 1896. | | Forward | | 4,257.79 |
| Feb'y | 17. | American Ice Co. foreclosure account: | | |
| | | C. B. Brown's bill, repairs | 198.90 | |
| Feb'y | 18. | American Ice Co. foreclosure account: | | |
| | | Hampden taxes | 57.00 | |
| | | | | 255.90 |
| | | | | 4,513.69 |
| | | Cr. | | |
| 1894. | | | | |
| May | 9. | By error in ch'g insurance | | 17.38 |
| | | | | 4,496.31 |

129 "G. B. C. No. 29."

No. 2.

*Transcript of Entries as They Appear upon the Record of Foreclosure Book of Eastern Trust and Banking Company of Bangor, Maine.*

American Ice Co. in % with Eastern Trust and Banking Co.

| | | | | | | |
|---|---|---|---|---|---|---|
| 1896. | | | | | | |
| Mar. | 17. | To money advanced as per vouchers to date and interest on same | | | $4,804.59* | |
| Mar. | 25. | To paid repairs on ice-house | | | 21.45 | |
| Oct. | 13. | " | " | taxes 1896 | 206.88 | |
| Dec. | 24. | " | " | insurance, J. W. McClure | 131.63 | |
| " | 26. | " | " | " T. F. & Co | 58.50 | |
| " | 31. | " | " | " W. F. C | 87.75 | |
| 1897. | | | | | | |
| Jan'y | 2. | " | " | " M. & P | 65.80 | |
| " | 5. | " | " | " J. W. McC | 29.25 | |
| " | 6. | " | " | " M. & P | 36.56 | |
| " | 8. | " | " | " B. B. & B | 58.50 | |
| " | 7. | " | " | team to Hampden, G. B. C | 1.00 | |
| Feb'y | 1. | " | " | insurance, M. & P | 29.25 | |
| " | 2. | " | " | Davis & Bailey to Jan'y 21, 1897 | 75.49 | |
| " | 18. | " | " | insurance, M. & P | 10.50 | |
| " | 19. | " | " | expenses C. E. Field on sale to C. W. M. | 3.50 | |
| | | Interest on above amounts to Feb'y 27, 1897 | | | 282.95 | |
| | | | | | | $5,903.60 |

Cr.

| | | | | | | |
|---|---|---|---|---|---|---|
| 1896. | | | | | | |
| Mar. | 17. | By received for rent to date | | | 2,400.00 | |
| | | " interest on same to date | | | 90.00 | |
| June | 30. | " received for rent | | | 600.00 | |
| 1897. | | | | | | |
| Jan'y | 23. | " received for rent | | | 1,800.00 | |
| | | " interest on above amounts to Feb'y 27, 1897 | | | 92.25 | |
| Feb'y | 27. | " balance | | | 921.35 | |
| | | | | | | 5,903.60 |

Statement and vouchers of above account were shown to bondholders' committee when closing account with them at sale of Maine property to the Consolidated Ice Co.

130 "G. B. C. No. 29."

No. 3.

*Transcript of Entries as they Appear upon the Record of Foreclosure Book of Eastern Trust and Banking Company of Bangor, Maine.*

Bondholders American Ice Co. in % with Eastern Trust and Banking Co.

Dr.

| | | | | | |
|---|---|---|---|---|---|
| 1897. | | | | | |
| Feb. | 27. | To balance of expenses to date | | 921.35 | |
| | | " cash paid John Miller | | 50.00 | |
| | | " paid Penob. Ice Co | | 3,500.00 | |
| Mar. | 19. | " " Eastern Trust & Banking Co., compensation to Mar. 12, 1897 | | 1,375.00 | |
| | 18. | " " J. B. Huckins' expense | | 25.00 | |
| | 19. | " " B. C. Additon bill | | 10.00 | |

* This amount is made up of total amount of expenses as per transcript No. 1 and interest on the several payments to March 17th, 1896.

| | | | | | |
|---|---|---|---|---|---|
| 19. | " | " | C. F. Woodard's bill | 130.00 | |
| 19. | " | " | C. A. Bailey " | 27.00 | |
| 18. | " | " | C. E. Field " | 75.00 | |
| 17. | " | " | B. F. Leighton " | 300.00 | |
| 18. | " | " | dividend | 13,650.00 | |
| | | | balance certif. of dep. | 287.57 | |
| | | | | | $20,350.92 |

CR.

| | | | | | |
|---|---|---|---|---|---|
| 1897. | | | | | |
| Mar. | 5. | By cash received from Consolidated Ice Co. for Maine property, including ice tools, etc | | 20,000.00 | |
| " | 5. | By return premiums, B. B. & B | | 35.10 | |
| | | " " " | T. F. & Co | 51.38 | |
| | | " " " | M. & P. | 98.99 | |
| | | " " " | W. F. C | 52.65 | |
| | | " " " | J. W. McC. | 112.80 | |
| | | | | | $20,350.92 |

DR.

| | | | | | |
|---|---|---|---|---|---|
| 1897. | | | | | |
| Apr. | 8. | To paid J. A. Lynham | | 15.63 | |
| May | 3. | " " Law Reporter Co | | 12.60 | |
| July | 23. | " " A. G. Kent, lease | | 50.00 | |
| 1898. | | | | | |
| Feb'y | 25. | " " J. Cassidy, expense to Wash., D. C. | | 48.19 | |
| Mar. | 25. | " " B. F. Leighton | | 100.00 | |
| May | 9. | " " part of bill for costs appeal | | 61.15 | |
| | | | | | 287.27 |

CR.

| | | | | | |
|---|---|---|---|---|---|
| 1897. | | | | | |
| May | 9. | By certif. of dep. to bal | | | 287.57 |

131

| | | | | | |
|---|---|---|---|---|---|
| 1898. | | | | | |
| May | 9. | To bal. of costs of appeal | | 17.77 | |
| Oct. | 20. | " bill for printing brief on appeal | | 24.75 | |
| 1899. | | | | | |
| Feb'y | 6. | " bill, C. A. Bailey | | 6.00 | |

Copy.

"G. B. C. No. 30."

To Edward L. Stewart, John B. Huckins, Alfred J. Robinson, Bangor, Me.

GENTLEMEN: We hereby constitute and appoint you our attorneys to represent us and act for us in all proceedings which in your opinion may be necessary to be taken for the protection of our interests as holders of bonds issued by the American Ice Co. of Bangor, Me., and secured by a deed of trust to the Eastern Trust & Banking Co. of Bangor, Me., dated December 2, 1889, of certain real estate in Maine and in the city of Washington, and it is our desire that you take all steps necessary for the protection and preservation of said security by the payment of fire insurance and taxes, and that you may obtain as soon as possible a sale by said trustee of all the property covered by said mortgage.

In witness whereof we have hereunto affixed our hands
132 and seals this sixth day of February, 1894.

Bangor, Me., Feb. 6, 1894.

| | | |
|---|---|---|
| F. H. CLERGUE. | 5,000 | [s. s.] |
| T. J. STEWART & CO. | 5,700 | " |
| J. B. HUCKINS. | 2,800 | " |
| FRANK HUCKINS, HARRY HUCKINS, CARRIE HUCKINS, | 1,700 | [L. s.] " " |
| By J. B. HUCKINS, *Attorney.* | | " |
| BERNICE MORSE, By F. H. CLERGUE, *Attorney.* | 1,000 | " |
| C. E. FIELD. A. J. ROBINSON, *Attorney.* | 1,100 | " |
| BACON & ROBINSON CO., By A. J. ROBINSON, *Sec.* | 200 | " |
| A. J. ROBINSON. | 200 | " |
| J. H. ROBINSON. A. J. ROBINSON, *Att'y.* | 1,100 | " |
| J. A. BACON. A. J. ROBINSON, *Att'y.* | 1,900 | " |

True copy of the original.

A. J. ROBINSON.

133 *Order Referring Cause to Auditor.*

Filed September 27, 1899.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, Complainant,
*vs.*
AMERICAN ICE COMPANY ET AL., Defendants. } No. 17259.

Upon motion of complainant's solicitor, it is this 27th day of September, A. D. 1899, ordered that this case be, and it hereby is, referred to the auditor to ascertain and report the amount due on the bonds secured by the deed of trust in these proceedings described. In taking said account the auditor shall consider the evidence now on file in said case, and such other and further evidence as shall be adduced by either side in the premises.

By the court:

A. B. HAGNER,
*Asso. Justice.*

134 *Order Amending Reference to Auditor.*

Filed February 7, 1900.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, Complainant, *vs.* AMERICAN ICE COMPANY ET AL., Defendants. } In Equity. No. 17259.

On motion of complainant's solicitor, it is this 7th day of February, A. D. 1900, ordered that the reference to the auditor passed herein on the 7th day of February, A. D. 1899, be, and it hereby is, amended and enlarged so that the auditor be, and he hereby is, authorized and directed to state the account of complainant as trustee under the deed of trust in complainants' bill described, and to ascertain and report the amount of the indebtedness still due upon said bonds under said trust and report the same to the court.

By the court:

JOB BARNARD, *Justice.*

135 *Report of Auditor.*

Filed March 23, 1900.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY *vs.* AMERICAN ICE COMPANY ET AL. } No. 17259, Equity Docket 40.

This cause is referred to the auditor to state the account of the complainant as trustee and to report the amount due on the bonds secured by the deed of trust in these proceedings described. After due notice, I proceeded under this order of reference and return herewith the testimony and exhibits submitted in proof.

The complainant and the defendant American Ice Company are corporations incorporated under the laws of the State of Maine. In December, 1889, the said American Ice Company executed and delivered to the complainant a deed or mortgage conveying all of its real estate and other property situated in the town of Hampden, in the State of Maine, and in the city of Washington, in the District of Columbia, to secure bonds of the said American Ice Company to the amount of $40,000.00, payable to the said Eastern Trust and Banking Company or bearer in yearly instalments of $5,000 00 each, the first to be payable in three years from December 1st, 1889, and bearing interest at the rate of six per cent. per annum, payable semi-annually. The first instalment of the bonds fell due December 1st, 1892,

and was paid, together with the interest then due upon all the bonds. In the meantime these bonds were delivered to various parties in the course of business. After default in the payment of the second instalment of the bonds and of the interest, such default continu-
136 ing for more than ninety days, the complainant company as trustee, by direction of the requisite number of bondholders, proceeded to execute the said trust by advertising for sale the real estate and personal property situated in the State of Maine, and on the 8th of September, 1894, John B. Huckins, E. L. Stewart, and John Miller, claiming to act as a committee of the bondholders, made a bid of $14,000.00, at which the property was struk off to them. No payment was made by the said parties, nor were the terms of sale in any respect complied with, but the property remained in the custody of the complainant trustee until sold by the said trustee, about the last of February or the first of March, 1897, to the Consolidated Ice Company. In this sale there was included a quantity of ice stored in the ice-houses of the said American Ice Company and a quantity of tools. It is claimed that these chattels were not included in the said deed of trust, and that they were sold in connection with the real estate as a matter of convenience.

The gross amount of this sale was $20,000.00, which was paid by the purchaser to the complainant trustee. By subsequent agreement of the said alleged committee of bondholders, the portion of this gross price representing the ice and tools sold was fixed at $3,500.00.

On the 18th of March, 1897, the complainant trustee, by the written direction of the said so-called committee of bondholders, a copy of which is contained in Exhibit "G. B. C. No. 28," attached to the deposition of George B. Canney, distributed to the holders of the remaining bonds sums equal to thirty-nine per cent. of the par value of the said bonds. A statement of this distribution will be found in Exhibit "G. B. C. No. 27," attached to the deposition of the said George B. Canney.

137 The question of the appointment of the said committee and of their authority will be hereinafter considered.

The first controversy arising here is whether the offer by the trustee of the property in Maine for sale on September 9th, 1894, and the bid of $14,000 by the so-called committee of bondholders amounted to a sale which should be taken as the basis of this account. On the 6th of February, 1894, the holders of $20,700.00 of the bonds executed a paper-writing of which the following is a copy:

"To Edward L. Stewart, John B. Huckins, Alfred J. Robinson, Bangor, Me.

GENTLEMEN: We hereby constitute and appoint you our attorneys to represent us and act for us in all proceedings which, in your opinion, may be necessary to be taken for the protection of our interests as holders of bonds issued by the American Ice Co. of Bangor, Me., and secured by a deed of trust to the Eastern Trust & Banking Co. of Bangor, Me., dated December 2, 1889, of certain real estate in

Maine and in the city of Washington, and it is our desire that you take all steps necessary for the protection and preservation of said security by the payment of fire insurance and taxes, and that you may obtain as soon as possible a sale by said trustee of all the property covered by said mortgage.

In witness whereof we have hereunto affixed our hands and seals this sixth day of Feb'y, 1894."

See Exhibit G. B. C. No. 30 with the last deposition of George B. Canney.

No written direction to the trustee to sell appears in evidence, but the published notices of sale recite the fact that such a request had been made by the bondholders. A copy of such notice is attached to the first deposition of the witness Canney. On the 8th of
138 September Stewart and Huckins, two of the parties to whom the power of attorney was given, together with John Miller, styling themselves "a committee representing nearly all the holders of the bonds," delivered to the trustee a written request prescribing the manner and terms of the sale, which, by reason of previous postponements, was again to be attempted on the following day. This request and direction is contained in "Complainant's Exhibit 1," also attached to the said deposition of Canney.

The only evidence or the appointment or authorization of this committee appears in the testimony of John Miller, in his deposition filed April 29th, 1897, in which he states (page 9) that "the three persons named (including himself) were appointed a committee by the bondholders at a meeting they held in Bangor in September, 1894." It does not appear in what manner this committee was appointed or to what extent the holders of the bonds participated in the act, or what general or special authority was given to the committee. It is therefore difficult, if not impossible, to determine the extent of the authority, if any, with which this committee was clothed and whether it extended to a purchase of the property on behalf of the bondholders. If this authority is claimed under the power of attorney, it must be noted that that paper conferred no power of substitution by which Miller could lawfully act in the place of Robinson, and it appears that Miller was the bidder for the committee at the sale. It is still further a serious question whether that power of attorney can be construed to authorize a purchase of the property by the attorneys as such or as a committee, or whether it could be effective for that purpose, being an authority granted by or for the holders of but about four-sevenths of the bonds.
139 These questions may be unimportant, however, in view of the subsequent proceedings and treatment of the matter by the trustee and parties interested. No part of the terms of sale were complied with; no transfer of title, right, or interest was made by conveyance, memorandum of sale, or delivery of possession. In short, no steps were taken looking to the consummation of a sale of property. The trustee had taken possession of the property about October, 1893, and continued that possession as trustee until the

sale of March, 1897. The witness Canney, secretary of the trustee company, submits with his second deposition a transcript of the entries in the books of the trustee, beginning with March, 1894, and continuing to the time of the latter sale. The original entries in the cash book appear under the name and style of "American Ice Co. foreclosure account," and in the other record of that company the entries are made under the name and style of "American Ice Co. in ac. with Eastern Trust and Banking Co." (Exhibit G. B. C. No. 29, parts 1 & 2). After the sale of 1897 the form of the account was changed and subsequent entries were made under the name and style of "Bondholders American Ice Co. in ac. with Eastern Trust and Banking Co.;" this account evidently being for the purpose of adjusting the proceeds of sale and distribution of the same for the information of the bondholders, shows the receipts of the proceeds of that sale and of rents and the disbursements of the same (same exhibit, part 3). After the sale of 1897 the so-called committee of bondholders gave to the trustee a paper, a copy of which is contained in Exhibit G. B. C. No. 28, in which they state that the property of the American Ice Company has been sold, including certain tools and ice, for $20,000.00, and the amount paid in
140 to the trustee, and the committee undertake to instruct the trustee as to the disposition of the said money.

The mortgagor or grantor in the deed of trust has rights in this proceeding which cannot be overlooked, and its counsel contends that the said mortgagor is entitled to the benefit of the price for which the property was sold in 1897.

In view of the facts and conditions appearing in proof, I am of the opinion that this contention is well founded, and have therefore taken the amount for which the property was sold in 1897 as the basis of this account.

The trustee rented this property in the latter part of 1894, or in January, 1895, at the rate of $2,400.00 per annum, and received that rental for two years, amounting to $4,800, with which they are also charged in my account. After the sale in 1897 the trustee received a rebate or refund of insurance premiums paid and is charged with the same in this account.

I have allowed the trustee credit for all disbursements and expenditures made for the protection and preservation of the property beginning with March, 1894, such as taxes, insurance, an item of payments of shore rent, and some repairs. I have also allowed the costs and expenses incurred in the several attempts to sell in 1894. It appears in the case that in closing and adjusting the sale of 1897 it was thought prudent, if not necessary, to have whatever claim might exist or be asserted by the so-called committee of bondholders by reason of their bid for the property at the sale of September, 1894, released, and in some form, which does not clearly appear, that committee united in or assented to the sale and conveyance of March, 1897. The trustee in the account rendered claims credit for certain expenditures in this connection. These are not itemized, but
141 they appear in form of expenses incurred by the members of the committee and some charges of counsel for services which

are not detailed. So far as these seem to be equitable, I have allowed them in this account.

I have excluded certain claims for credit made by the trustee, such as fees paid for opinions of counsel in Washington and in Maine. Some of these items, at least, relate to the Washington property, which was included in the deed of trust; and, in this connection, I have also excluded an item of expenses of the president and another of the secretary of the trustee company for trips to Washington, which also related to the property here. Another item, under the head of legal expenses, $331.10, appears to relate to the suits at law brought by the trustee in this court, being Nos. 36903 and 36904, relating exclusively to the property in Washington.

Other items of credit claimed by the trustee are for costs and counsel fees expended or advanced in the present cause, and these, so far as this account is concerned, are excluded.

Under date of December, 1894, the trustee claims credit for an item of "Expenses, receiver, &c., 1,051.42." It appears that in October, 1893, a stockholder of the American Ice Company filed his bill of complaint in the circuit court of the United States in Maine alleging certain mismanagement on the part of officers of the said ice company and praying the appointment of a receiver to collect the debts and receive the assets and property of the corporation and, under the direction of the court, continue the management of its business until a sale or other disposition should be made. After a hearing the court made what is styled an "interlocutory
142 decree," appointing John R. Mason, of Bangor, Maine, receiver of the assets of the company in the district of Maine, with authority to continue shipments of ice, collect debts, &c., and the decree provided that the said receivership should terminate at the expiration of one calendar month from the approval of the bond of the receiver, unless otherwise thereafter ordered. The receiver's bond was approved on the 13th of October, 1894. On the 18th of November the court passed an order directing that upon the payment to the receiver of his charges and disbursements by the defendant corporation the receiver should be finally discharged from his receivership. On the 24th of February, 1894, the receiver filed a petition stating that the defendant corporation had refused payment of his charges and disbursements, and praying leave to lease the property of the defendant company on such terms as the court might adjudge.

The Eastern Trust and Banking Company was not a party to the original bill, and on the 26th of February, 1894, the complainant filed a motion for and obtained leave to amend by adding the said company as a party defendant and by inserting an averment setting forth the conveyance by the American Ice Company of its real estate in Maine to the Eastern Trust and Banking Company in trust to secure the $40,000.00 of bonds, &c.

At this point I note that although served with process the said Eastern Trust and Banking Company made no appearance then or thereafter in the said cause.

143 On the 17th of March the receiver filed a petition setting forth that in the ice-houses of the ice company there *was* about 9,000 tons of ice; that the Eastern Trust and Banking Company was a creditor of the said ice company in the sum of $3,250.00, and claimed a lien upon the said ice as security therefor by virtue of a mortgage, and praying leave to sell the said ice for the purpose of satisfying the claim of the said company. On the 23rd of March the court authorized the receiver to sell the said ice to pay costs and charges out of the proceeds and pay the balance into the registry of the court. In October following the receiver filed an account of his sales of ice and his costs, expenses, and charges, showing a balance in his hands of $2,874.19, which he paid into the registry of the court. The cause was then referred to a master to state the account of the receiver and for other purposes, and the master in a report filed thereafter allowed the receiver certain fees and commissions which had not been stated in the report and account filed by the receiver. The report of the master also set forth the fact that the American Ice Company during the season of 1892–'3 borrowed from the Eastern Trust and Banking Company certain monies upon two notes of the ice company which by contract of the parties were secured by a lien upon the ice of the said ice company.

The report further recited that the said ice was sold from time to time by the said ice company and payment from the proceeds of such sales made on account of the said notes, and that on the 4th of October, 1894, there was due and unpaid of the said notes the sum of $3,243.13. The master then undertakes to apportion
144 what he styles "the receiver's charges, fees, and commissions," and in which he in fact includes all the costs of that suit, including complainant's counsel fees and various other court costs and expenses and other charges, amounting in all to $1,123.42, and by some process of "marshalling," as he terms it, he apportions upon the real estate of the ice company $948.42 of that sum and the remainder upon the proceeds of the ice. He also states his own fee of $50.00, and apportions upon the real estate $40.00 of that sum.

Upon the hearing of the master's report the court made an order apportioning the said costs, charges, and expenses, adding thereto the fee of the clerk for receiving, keeping, and paying out the fund which had been deposited in the registry as the balance of the proceeds of sale of the ice, charging the real estate with $23.00 of the same (and the personal property $5.75), and also $40.00 of the fees of the receiver's counsel, making in all apportioned on the real estate $1,051.42.

If the reports of the receiver are taken as asserting possession by him of the real estate of the American Ice Company in Maine, it is contradicted by the testimony of the trustee through its secretary, to the effect that the trustee took possession of the said property directly after the assignment of the American Ice Company, which was made on the 13th of October, 1893, and I am constrained to interpret the reports of the receiver in that cause asserting possession as limited to the ice and other chattels. This being the fact, I

am unable to see how the real estate could be charged with any portion of the costs, charges, and expenses of the receiver.

145 The possession of the trustee may also explain the fact that the receiver, although authorized to lease the property, did not do so, while the trustee did lease the property and collected rent.

A fair illustration of the method of apportionment adopted by the master and court is found in the charge of almost the entire poundage of the clerk upon the fund deposited in the registry upon the real estate, although that fund was exclusively proceeds of sale of the ice and distributed finally to the complainant by virtue of a contract lien limited to the ice. It is contended that under the circumstances of that case the court was without power to diminish or impair the lien of the deed of trust of December, 1889, securing the bonds. Without discussing the issue of the power of the court in that respect, I am of the opinion that it was not the intention of the court to displace the lien of the deed of trust, but to subject the real estate to the charges recited in the final order only so far as the American Ice Company had an equity in the said realty, or, in other words, the charge was to be subject to the lien of the trust.

In Schedule A, I have stated the account of the trustee upon the basis of the views herein expressed, showing a balance in the hands of the trustee after allowing credit for the distribution made to the bondholders.

I have deducted from this balance, however, some further credits claimed by the trustee and which seem to have been allowed by the said committee of bondholders in an adjustment with the trustee, a copy of which is contained in "Exhibit G. B. C. No. 28," so far as these credits appear to be actual expenditures, but not in-

146 cluding the claim of $1,051.42. I have then treated the aggregate of these additional allowances as a further distribution to the holders of the bonds.

In Schedule B, I have made a statement showing the amount due on the bonds at the time of the said distribution, the payment made, and the balance remaining due and unpaid at that date.

Auditor's fees, $50.00.

JAS. G. PAYNE, *Auditor.*

March 20, 1900.

147 SCHEDULE A.

*Account of Eastern Trust and Banking Company, Trustee.*

DR.

| | | |
|---|---|---|
| March 5, 1897. | | |
| To proceeds of sale of real estate included in deed of trust and sale of ice and tools.. | 20,000.00 | |
| Deduct for ice and tools..... | 3,500.00 | |
| | | 16,500.00 |
| Return of insurance premiums..... | | 350.92 |

| | | | |
|---|---|---|---|
| March 16, 1896. To rents received..... | | 2,400.00 | |
| June 30, " " ditto ..... | | 600.00 | |
| Jan. 23, 1897. " ditto ..... | | 1,800.00 | |
| | | 4,800.00 | |
| Interest to February 27, 1897..... | | 182.25 | |
| | | | 4,982.25 |
| | | | 21,833.17 |

Cr.

| | | |
|---|---|---|
| By taxes paid prior to first sale..... | 317.90 | |
| insurance do. ..... | 555.99 | |
| publication of notice of sale..... | 204.36 | |
| C. S. Pearl, auctioneer..... | 30.00 | |
| rent of room ..... | 2.00 | |
| additional to auctioneer..... | 25.00 | |
| taxes to March 17, 1896..... | 418.80 | |
| insurance do. ..... | 1,080.84 | |
| shore rent..... | 100.00 | |
| repairs..... | 198.90 | |
| taxes paid for 1896..... ..... | 206.88 | |
| repairs..... | 21.45 | |
| insurance..... | 507.74 | |
| C. E. Field, expenses.. ..... | 3.50 | |
| team to Hampden..... ..... .... | 1.00 | |

148 *Account of Trustees*—Continued.

| | | |
|---|---|---|
| Brought forward ..... | | 21,833.17 |

Cr.

| | | |
|---|---|---|
| By paid John Miller..... | 50.00 | |
| J. B. Huckins, expense..... | 25.00 | |
| B. C. Additon bill..... | 10.00 | |
| C. F. Woodward " ..... | 130.00 | |
| C. E. Field " ..... | 75.00 | |
| A. G. Kent, lease ..... .... | 50.00 | |
| interest on monies advanced for taxes, insurance, and expenses from the respective dates to February 27, 1897 ..... | 6* 387.73 | |
| allowance to the trustee of 5 per cent. on gross amount of receipts. | 1,091.66 | |
| | | 5,493.75 |
| Balance ... ..... ... ..... | | 16,340.42 |

[* In pencil in copy.]

CR.

| | | |
|---|---|---|
| By distributed to holders of bonds 39 per cent. of 35,000, principal of bonds..... | | 13,650.00 |
| | | 2,690.42 |

CR.

| | | |
|---|---|---|
| By disbursements authorized by the committee of bondholders in their adjustment with the trustee and not allowed in the foregoing account, as follows: | | |
| paid Edwards & Barnard..... | 50.00 | |
| E. B. Canney, expenses to Washington ..... ..... | 80.00 | |
| Davis & Bailey, 50.00 and 75.49... | 125.49 | |
| Costs and expenses in case 36903, at law..... ..... | 331.10 | |
| B. F. Leighton, fees in same ..... | 300.00 | |
| J. Cassidy, expenses to Washington. | 48.19 | |
| | | 934.78 |
| | | $1,755.64 |

JAS. G. PAYNE, *Auditor.*

149 SCHEDULE B.

*Account to Show Amount Due on the Bonds Secured by the Deed of Trust.*

At the time of the distribution of the proceeds of sale of the property in Maine, March 18, 1897, interest on the bonds from June 1, 1893, was due and unpaid, amounting to $22.80 on each $100.00 of bonds.

The amount due at the time of the said distribution on each $100.00 of the bonds was—

| | | |
|---|---|---|
| Principal..... .... | 100.00 | |
| Interest..... ..... ..... | 22.80 | |
| | | 122.80 |
| The trustee distributed to the holders of the bonds at that time from the proceeds of sale under the deed of trust the sum of $13,950.00, being on each $100.00 of principal of bond.... .... ..... ..... ..... | | 39.00 |
| | | 82.80 |
| The bondholders are also chargeable with certain costs and expenses set forth in Schedule A, $934.78, being on each $100.00 of principal of bond..... | | 2.69 |
| Balance due on each $100.00 of bonds March 13, 1897. | | 80.11 |

JAS. G. PAYNE, *Auditor.*

150 EASTERN TRUST & BANKING COMPANY
*vs.*
AMERICAN ICE COMPANY ET AL.

NOVEMBER 3D, 1899—11 o'clock a. m.

Hearing pursuant to notice.

Present: Mr. Leighton, for complainant, and Mr. Johnson, for the defendant.

JOHN MILLER, having first been duly sworn, testifies as follows:

By Mr. LEIGHTON:

Q. Mr. Miller, you have already testified in this case once before? A. Yes, sir.

Q. I show you exhibit marked "Copy, G. B. C. 28," attached to Mr. Canney's deposition. That paper purports to be a copy signed by yourself, Mr. Huckins, and Mr. Stewart, as a committee representing the bondholders under this trust. I want to know—according to that statement the property sold for $20,000.00, and that included the real property—ice and tools—I want to know whether this committee of bondholders considered that they had anything to do with the ice and tools? A. They had nothing to do with it. When we sold that property to the Consolidated Ice Company we sold the real estate for $16,500.00.

Q. And the balance of the $20,000.00 represented other property which you did not own? A. Yes, sir.

Q. In the sale, then, as made the real estate passed and such ice as happened to be on hand and the tools? A. They did.

151 Q. And as bondholders you had nothing to do with the ice and tools? A. Nothing at all.

Q. The cash which you received from that second sale, $16,500.00, represented the real estate? A. Yes, sir.

Q. Who was the purchaser of this property? A. The Consolidated Ice Company of New York.

Cross-examination.

By Mr. JOHNSON:

Q. Who was the lessee of the property? A. A syndicate in Bangor. I think they called themselve the Penobscot Ice Company.

Adjourned subject to notice.

152 *Order to Calendar.*

Supreme Court of the District of Columbia.

EASTERN TRUST & BANKING COMPANY
*vs.*
AMERICAN ICE CO. ET AL. } No. 17259.

The clerk will please calendar this cause for hearing at the next term of court.

B. F. LEIGHTON.

April 24, 1900.

Calendared as ordered, April 24, 1900, by clerk.

*Motion to Strike Case from Calendar.*

Filed May 14, 1900.

In the Supreme Court of the District of Columbia.

EASTERN TRUST & BANKING COMPANY
*vs.*
AMERICAN ICE COMPANY ET AL. } No. 17259. In Equity.

Now come the defendants The American Ice Company and William G. Johnson, assignee, and move the court to strike this case from the trial calendar, and for leave to these defendants to take testimony, and for cause for said motion show as follows:

1. That this cause came on for final hearing and was terminated by a final decree on the 16th day of March, 1898. Appeals were taken by both complainant and defendants from this decree, and on February 28, 1899, the Court of Appeals reversed this final decree, and by its mandate filed herein March 31st, 1899, remanded the cause to this court for further proceedings.

153

2. Thereafter, under a stipulation of counsel filed July 6, 1899, the depositions were taken in behalf of complainant in Bangor, Maine.

3. On September 27, 1899, an order was passed referring the cause to the auditor, but before proceedings thereunder were completed the said order of reference was modified by an order passed herein on the seventh of February, 1900, under and by virtue of which the auditor undertook to ascertain and report to the court the amount due and unpaid on the bonds, and his report thereunder was filed March 23, 1900.

4. That no time was fixed by the court within which complainant was required to take its testimony; that complainant took testimony before the auditor in the said reference, but never announced its testimony as closed, and that no time was limited to defendants within which to take testimony after the closing of complainant's testimony.

5. That on the 24th of April, 1900, without any notice to defendants or their counsel, complainant's counsel entered an order in Order Book No. 17, folio 318, directing the clerk to calendar this cause for the next term of this court.

154 6. That defendants had no notice nor knowledge of such calendaring of said cause for hearing until the ninth day of May, 1900, when said cause was called for final hearing.

7. That at the time said cause was placed on the calendar the same was not at issue and ready for hearing, and that defendants were entitled under the rules of court to have time to offer evidence in their behalf after the closing of complainant's case, and to notice of the cause being calendared, neither of which has been accorded, and that only one day elapsed between the time for filing exceptions to the auditor's report and the calendaring of said cause.

8. That by the opinion and judgment of the Court of Appeals in this case no sale can be made of the premises herein described until after the case of The United States *vs.* Morris *et al.*, No. 10306 in equity, shall have been decided, and the said cause is still pending and undecided in this court under the mandate of the Supreme Court of the United States remanding said cause to this court in general term for further proceedings.

That in the said cause of The United States *vs.* Morris *et al* the title, rights, and interests of all parties to this property were attacked by the United States, and said suit was defended wholly at the expense of the defendant assignee herein, the complainant never having appeared in said cause or taken any part therein; that all the beneficial results of said proceeding and the expenses incurred therein, including the services of counsel, will, in the event of a decree for sale herein, enure greatly, if not wholly, to the benefit of complainant; and before the complainant shall be entitled

155 to a decree of foreclosure and sale, evidence should be adduced and an account should be taken of the said expenses and services, and a proper charge therefor made against complainant.

9. That by the restricted terms of the order of reference to the auditor herein such matters are not cognizable by the auditor, whose authority was limited to the ascertainment of the amount due upon the bonds secured by the mortgage in these proceedings described.

CARLISLE & JOHNSON,
*Solicitors for Defendants.*

*Decree of Sale, &c.*

Filed May 15, 1900.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, Complainant, *vs.* AMERICAN ICE COMPANY ET AL., Defendants. } Equity. No. 17259, Docket No. 40.

This cause came on to be further heard at this term of court, on the mandate of the Court of Appeals herein, and the auditor's report, and the pleadings and evidence taken in said cause, and was argued by counsel; upon consideration whereof it is, this 15th day of May, A. D. 1900, adjudged, ordered, and decreed that the decree of sale heretofore passed in this cause be, and the same is hereby,
156 set aside, annulled, and for naught held, and in lieu thereof it is hereby adjudged, ordered, and decreed as follows, to wit:

First. That the auditor's report filed herein on the 23d day of March, A. D. 1900, be, and the same is hereby, ratified and confirmed.

Second. That The Eastern Trust and Banking Company, complainant herein, be, and it hereby is, authorized and empowered to take immediate possession of the property in these proceedings described, and that the defendants and each of them be, and they hereby are, perpetually enjoined from interfering with the said complainant in any manner in respect thereto, and that the defendant Wm. G. Johnson, assignee of the American Ice Company, shall surrender and yield peaceable possession thereof unto the said complainant or its attorney of record upon demand being made upon him therefor.

Third. That there is still due on account of the bonded indebtedness secured by the deed of trust or mortgage in these proceedings described the sum of $28,038.50, with interest from the 13th day of March, A. D. 1897, and that the complainant herein, the said Eastern Trust and Banking Company, as trustee under said mortgage or deed of trust in these proceedings described, is entitled to have the same foreclosed and to have all the right, title, and interest of the said defendants, The American Ice Company and Wm. G. Johnson, assignee, in his character of assignee, or either of them, in and to the property therein described sold for the purpose of paying the bonded indebtedness secured by said deed of trust, and
157 that Benjamin F. Leighton and Calderon Carlisle are hereby appointed trustees to sell all the right, title, and interest of the parties to this cause in and to all that certain piece, parcel, and lot of real estate situate in the city of Washington, District of Columbia, more particularly described as follows, to wit:

All that piece or parcel of land, with the improvements thereon, lying in the city of Washington, District of Columbia, and being opposite square numbered two hundred and seventy (270), running thence southerly with the west line of Thirteenth street to the channel of the Potomac river; thence westerly with said channel to a point opposite the southwest corner of said square numbered two hundred and seventy; thence due north to the said southwest corner of said square two hundred and seventy, following the eastern line of what is alleged to be Thirteen-and-a-half street; thence with the southern line of said square two hundred and seventy two hundred and fifty-five (255) feet one (1) inch to the place of beginning; together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining, and all the remainders, reversions, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand, either at law or in equity or otherwise however, of the said parties to this cause.

And the course and manner of their proceeding shall be as follows: They shall first give a bond, to be approved by the court in the sum of five thousand dollars, conditioned for the faithful performance of their duties as such trustees, and shall give at least ten days' previous notice, in one or more daily newspapers published in the city of Washington, in said District, and such other notice
158 as they may think proper, of the time, place, manner, and terms of sale; which terms of sale shall be as follows, to wit: One-third of the purchase-money in cash, and the balance in two equal instalments at one and two years, secured by the promissory notes of the purchaser or purchasers, with interest thereon from the day of sale, and a good and valid deed of trust, to the satisfaction of the trustees, on the property sold, or all cash, at purchaser's option; and as soon as may be convenient after such sale or sales the trustees shall return to this court a full and particular account of the same, with an affidavit of the truth thereof and of the fairness of such sale or sales annexed; and upon full compliance by the purchaser or purchasers with the terms of sale and upon the final ratification of such sale or sales by the court, and not before, the said trustees, by good and sufficient deed, to be executed and acknowledged in accordance to law, shall convey to the purchaser or purchasers of said property and to his, her, or their heirs the property to him, her, or them sold, free, clear, and discharged of all claim of the parties to this cause or of any person or persons claiming by, from, or under them, and the said trustees shall account to this court for the money arising from such sale or sales, and the notes which may be taken for the same shall be disposed of under the direction thereof, after deducting therefrom the costs of this suit and such commission to the trustees as the court shall see proper to allow in consideration of the care, skill, and fidelity with which they shall appear to have discharged the trust.

Fourth. It is further adjudged, ordered, and decreed that
159 in the event the proceeds arising from the sale hereinbefore decreed be insufficient to pay and discharge in full said

bonded indebtedness, then, and in such an event, it shall be the duty of the defendant, the said Wm. G. Johnson, and he is hereby directed to pay unto the said trustees in this cause the sum of $3,000, paid by the said defendant insurance companies to him, under a certain stipulation in these proceedings filed, or so much thereof as may be necessary to pay said deficit, not to exceed in any event the sum actually paid to him by said companies, to wit, the sum of $3,000, and the same shall be applied to the said trustees as may be directed by the further order of the court in the premises.

By the court:

JOB BARNARD, *Justice.*

*Appeal.*

Supreme Court, District of Columbia.

EASTERN TRUST & BANKING CO. *vs.* THE AMERICAN ICE CO. ET AL. } 17259. Equity.

The clerk will please enter an appeal to the Court of Appeals by the American Ice Company and William G. Johnson, assignee, from the decree passed May 15, 1900, and issue citation.

CARLISLE & JOHNSON, *For Def'ts.*

Appeal, as ordered, entered.
BY CL'K.

1900, 6, 2.

160 Filed Jun- 5, 1900. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY, a Corporation, *vs.* AMERICAN ICE COMPANY, a Corporation. } No. 17259. In Equity.

The President of the United States to Eastern Trust and Banking Company, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal entered in the supreme court of the District of Columbia on the 2nd day of June, 1900, wherein The American Ice Company and William G. Johnson, assignee, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this second day of June, in the year of our Lord one thousand nine hundred.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 5th day of June, 1900.

B. F. LEIGHTON,
*Attorney for Appellee.*

161 *Memorandum.*

June 2, 1900.—$100 deposited in lieu of appeal bond by leave of court.

*Stipulation.*

Filed July 5, 1900.

In the Supreme Court of the District of Columbia.

THE EASTERN TRUST & BANKING COMPANY
*vs.*
AMERICAN ICE COMPANY ET AL. } No. 17259. Equity.

It is hereby stipulated and agreed by and between complainant and defendants that the transcript of record on appeal to the Court of Appeals taken by said defendants on the 2nd day of June, 1900, shall consist of the printed record heretofore used in said Court of Appeals on the former appeals herein, to which shall be added the following: September 22, 1899, deposition of George B. Canney; September 27, 1899, order referring cause to auditor; February 7, 1900, order amending reference to auditor; March 23, 1900, report of auditor without vouchers; April 24, 1900, order to calendar (Order Book 17, page 318); May 14, 1900, motion to strike from calendar; May 15, 1900, decree for sale; June 2, 1900, appeal, citation, etc.

B. F. LEIGHTON,
*Sol'rs for Complainant.*

CARLISLE & JOHNSON,
*Sol'rs for Defendants.*

162 *Order Extending Time, &c.*

Filed July 18, 1900.

In the Supreme Court of the District of Columbia.

EASTERN TRUST AND BANKING COMPANY
*vs.*
AMERICAN ICE COMPANY ET AL. } No. 17259. In Equity.

On motion of Calderon Carlisle, solicitor for the defendant William G. Johnson, assignee, it is by the court, this 18th day of July,

A. D. 1900, ordered that the time for preparing and filing the transcript on the last appeal taken in this cause to the Court of Appeals of the District of Columbia be, and the same is hereby, extended until the first day of August, 1900.

A. B. HAGNER,
*Asso. Justice.*

I consent.
B. F. LEIGHTON,
*Sol'r for Complainant.*

163 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
*District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 84, inclusive, to be a true and correct transcript of the record, as per stipulation of counsel filed herein, copy of which is made part hereof, in cause No. 17259, equity, wherein Eastern Trust and Banking Company is complainant and American Ice Company *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 31st day of July, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1013. American Ice Company and Wm. G. Johnson, assignee, appellants, *vs.* Eastern Trust and Banking Company. Court of Appeals, District of Columbia. Filed Jul- 31, 1900. Robert Willett, clerk.

126 TUESDAY, *December* 18*th*, *A. D.* 1900.

AMERICAN ICE COMPANY and WILLIAM G. JOHNSON, Assignee, Appellants,
*vs.*
EASTERN TRUST AND BANKING COMPANY. } No. 1013.

The argument in the above-entitled cause was commenced by Mr. Wm. G. Johnson, attorney for the appellants, and was continued by Mr. B. F. Leighton, attorney for the appellee, and was concluded by Mr. Wm. G. Johnson, attorney for the appellants.

127 AMERICAN ICE COMPANY and WILLIAM G. JOHNSON, Assignee, Appellants,
*vs.*
EASTERN TRUST AND BANKING COMPANY. } No. 1013.

*Opinion.*

Mr. Justice MORRIS delivered the opinion of the court:

This case was before us on a previous appeal, the report of which appears in 14 D. C. App. 304: and a report of another phase of the controversy between the parties appears at an earlier date in 6 D. C. App. 375: and 169 U. S. 295. In view of the full statements contained in those reports, it is unnecessary to repeat here the facts and circumstances of the controversy further than to say that the proceeding was commenced by the filing of a bill to foreclose a mortgage, or rather a deed of trust given by way of mortgage; and that the previous appeal was from a decree of the supreme court of the District ordering a sale of the mortgaged property, but denying other relief prayed by the complainant in the cause, the present appellee. This court reversed that decree, and remanded the cause for an accounting to be had of the amount due and payable of the mortgage debt, as preliminary to a decree of foreclosure; and also, inasmuch as the mortgaged property, being wharf property in the city of Washington fronting on the Potomac river, was within the limits of a district or territory to which the United States at that time, in a suit generally known as the Potomac Flats case, was seeking to establish a paramount title, a suit then pending in the Supreme Court of the United States and undecided, this court gave the following direction:

"The sale of the property, however, under any decree that may be passed, should not be allowed to be made until after the case of Morris and others *v.* United States, known as the Potomac Flats case, now pending in the Supreme Court of the United States, shall have been decided; for otherwise the sale of the property made subject to the final decision of that case could not be other than a mere speculation, and would most likely result in obtaining no more than a mere nominal sum."

When the cause remanded went back to the supreme court of the

District, it was referred to the auditor of that court to state the complainant's account as trustee under the deed of trust, some funds having already been realized from the sale of property in the State of Maine, and to ascertain and report the amount of the indebtedness yet due and unpaid under the deed. This the auditor proceeded to do, and he found a balance of $1,755.64 yet remaining in the hands of the trustee and applicable to the payment of the indebtedness secured by the deed; and the amount yet due under the deed of the indebtedness thereby secured he found to be $28,038.50. No exception was taken by either side to the report; and the time allowed by the rules of the court for the filing of exceptions having elapsed, the solicitor for the complainant caused the case to be placed on the calendar of the court for the ensuing monthly term. This is claimed to have been done without notice to the solicitor for the defendants; and thereupon motion was made on their part to strike the cause from the calendar, for which several grounds were assigned, among others, that the Potomac Flats case was still pending undecided in the supreme court of the District under the mandate of the Supreme Court of the United States remanding it for the ascertainment of some rights supposed to be in some of the parties thereto. It does not appear from the record whether any direct action was taken by the court on this motion; but the cause went on to argument, and was argued by counsel on both sides, and thereupon a final decree of foreclosure was entered.

This decree, after vacating the prior decree of foreclosure which we had reversed on the former appeal, adjudged: (1) That the auditor's report should be ratified and confirmed; (2) that the Eastern Trust and Banking Company was entitled to take immediate possession of the mortgaged property, and that such possession should be surrendered to it; (3) that there was due under the mortgage the sum of $28,038.50, with interest from March 13, 1897, and that the mortgaged property should be sold to pay this indebtedness. Trustees were appointed to make the sale, and the usual directions were prescribed for their conduct. It was further provided that, in the event of the insufficiency of the proceeds of sale to satisfy the mortgage debt, certain insurance money to the amount of $3,000, collected by William G. Johnson, as assignee, and which was mentioned and provided for on the former appeal, or so much thereof as might be necessary, if the whole were not necessary, should be paid by Johnson to the said trustees to be applied by them under the orders of the court.

From this decree The American Ice Company and William G. Johnson, assignee, the defendants in the suit, have prosecuted the present appeal.

There are five assignments of error: (1) That the court below erred in not striking the case from the calendar, and in proceeding to a decree; (2) that there was error in decreeing that there was due upon the bonds secured by the deed of trust the sum of $28,038.50, with interest from March 13, 1897; (3) that it was error to decree a sale of the real estate for the payment of this indebtedness; (4) that it was error to decree that the insurance money to the

amount of $3,000 was liable for any deficiency arising from the sale of the real estate; (5) that it was error not to have dismissed the bill.

1. With reference to the first of these assignments, it seems to be sufficient to say that, in so far as it refers to the practice of the court below, that practice is wholly immaterial on this appeal. If there was irregularity in the matter of calendaring the cause, which is by no means certain, it was waived or cured by the appearance of the appellants in the argument of the cause and their participation therein. They had their day in court, and they were not prejudiced by any failure of notice to appear. And so far as this assignment of error has reference to supposed imperfections in the audit or in the scope of the reference to the auditor, it would have been easy to cure them either by exceptions to the auditor's report, or by testimony before the auditor, or by application to the court to enlarge
128 the scope of the reference, no one of which was sought to be done. It is too late for the appellants to complain in this court of that which was their own failure in the court below. We find no merit in this first assignment of error.

2. In the second assignment of error it is complained that the court below was wrong in its adjudication that there was due to the complainant upon the bonded indebtedness secured by the deed of trust the sum of $28,038.50, with interest from March 13, 1897. The ground of this complaint is that it appears from the auditor's report that there is in the hands of the trustee the sum of $1,755.64 applicable to the payment of the indebtedness; and that, if this were so applied, the indebtedness would be reduced to that extent, that is, to the sum of $26,282.86. Controversy on this point is terminated by the agreement of counsel for the appellee in his brief and in open court to have the amount of the indebtedness so reduced. The decree, therefore, will be modified so as to adjudge the indebtedness due to be the sum of $26,282.86.

3. The third assignment of error is that the court should not have decreed the sale of the real estate mentioned in the proceedings in order to pay the alleged bonded indebtedness. And the argument here is that substantially the same conditions yet exist as existed at the time of our former decision with reference to the Potomac Flats case, when we held that, under any decree that should be passed, no sale of the property should be allowed until after the decision of that case, then pending in the Supreme Court of the United States.

The Potomac Flats case was decided by the Supreme Court of the United States on May 1, 1899; and it was there determined that the fee-simple title to the property involved therein, which embraced the real estate sought to be conveyed by the deed of trust mentioned in this case, was in the United States. But it was recognized in the opinion of the court, as it had been by the act of Congress under which the suit had been instituted, that the occupants of the wharves and other property embraced in the suit might have rights which should not be taken without just compensation; and accordingly the cause was remanded to the supreme court of the District of Columbia in order that there should be an inquiry into such rights and inter-

ests and a valuation of them. At what time the mandate of the Supreme Court of the United States went down to the supreme court of the District of Columbia, we are not advised; but it could not have been very long delayed, for the Supreme Court of the United States adjourned within less than a month after the announcement of the decision. After being remanded, however, the Potomac Flats case seems to have been consigned to the limbo of dead issues, and no attempt, at all events no serious attempt, seems ever to have been made by any one to resuscitate it from its condition of suspended animation. We understand that neither the Attorney General of the United States, nor any one else acting for the United States, has sought to take possession of the wharf property involved in that suit, or has taken any steps to have a valuation of the rights of the occupants thereof; and no one acting on behalf of the occupants has taken any steps for that purpose. All the parties seem to be willing to permit the matter to rest indefinitely and until some emergency arises to demand energetic action, which may possibly be in the remote future.

The American Ice Company, one of the appellants in this case, was a party to the Potomac Flats case, and participated in the conduct of that litigation until the final decision by the Supreme Court. The Eastern Trust and Banking Company, the appellee here, was not a party to that suit; and it is argued here on behalf of the appellants that it could not now be permitted to intervene in it in any manner. And the argument is further, that, until the rights of the American Ice Company shall have been determined in the Potomac Flats case, or, in other words, until the American Ice Company thinks proper to move in the Potomac Flats case for a valuation of its interest, which, of course, it may postpone forever, if it chooses, there can be no sale of that interest, and no decree should be rendered for such a sale. But the very statement of such a proposition as this is sufficient to discredit it. Were we to adopt it as the law of this case as now developed, it would simply be an invitation to the American Ice Company to take advantage of its own inactivity in order to perpetuate a wrong on the appellee. What the valuation of its interest in the premises would prove to be, if actively pressed to a determination, we cannot, of course, anticipate; but it may be questioned, from the record of this litigation, whether it would be sufficient to satisfy the claims of the appellee and its other creditors. The American Ice Company, therefore, has probably no motive of self-interest to move for the ascertainment of the value of its interest in the property in controversy; and it does not seem to be eager to admit the appellee to a share in the work of inquiry into that matter. It seems never to have called upon it for assistance, or requested it to contribute to the expense; and yet one of the grounds of complaint here on the part of the appellants is that the appellee has not contributed to the cost of that litigation.

The direction in our former opinion in this case, that there should be no sale until after the determination of the Potomac Flats case, was manifestly intended for the benefit of all the parties to this cause, and most of all for the benefit of the appellants. But if the

appellants by their continued inaction refuse to procure the desired determination of their interest, and at the same time refuse to put the appellee in such position as that it may act in its place in that case, it cannot thereby be permitted to defeat the just rights of the appellee. And it cannot complain if the appellee is thereby remitted to the speedy execution of the mortgage to which it is entitled. We have no doubt that, if the appellants persist in their course of inactivity in the Potomac Flats case, there will be no difficulty in substituting a purchaser at a sale under a decree in this case in its place and stead, to ascertain the value of the interest in controversy. That interest can be ascertained before such sale by the action of the appellants or with their concurrence; after the sale it can be ascertained without such concurrence.

129 A condition of things somewhat similar to this was developed in the case of Bryan *v.* May, 9 App. D. C. 383, where we remanded a cause in order that a bill of complaint should be amended and a somewhat indefinite interest made definite. A sale of the interest to which the complainant was entitled was postponed until the extent of that interest could be ascertained. Instead of having this interest ascertained, the defendant adopted a policy of obstruction; and a decree was thereupon rendered to expose his unascertained interest for sale, and we approved that decree. May *v.* Bryan, 16 App. D. C. 556. What was said in that case is not inapplicable to the case now before us.

We are of opinion, therefore, that the third assignment of error is without merit.

4. With reference to the fourth assignment, namely, that it was error to hold that the insurance money, amounting to $3,000, should be liable for any deficiency arising from the sale of the real estate, it is conceded by the appellants that the question was fully disposed of on the former appeal (14 App. D. C. 337), adversely to their contention; and that the point is now made only for the purpose of having the question reserved in the event of an appeal to the Supreme Court of the United States. The assignment, therefore, needs no further consideration from us at this time.

5. The fifth and last assignment is that the bill of complaint should have been dismissed. It is not usual to consider a general assignment of this kind without some specification. It is true that there is in the brief for the appellants a suggestion in this connection that, in view of the sale or sales which had been made of property in Maine, the appellee should not now be permitted to have recourse to the property in this District. But, as the defendants have been given the benefit of all the sales in Maine and credited with the highest amount realized, and as that amount falls far short of discharging the indebtedness, it is not apparent why the mortgagee should be debarred from recourse to the other property covered by the mortgage. But this point does not seem to be seriously insisted on here by the appellants, and the assignment of error is no more than a merely formal assignment.

From what we have said it follows in our opinion that the decree of the supreme court of the District of Columbia here appealed from

is right and just, and that it should be affirmed, with costs, with the modification, however, that the amount of the indebtedness secured by the mortgage is reduced to the sum of $26,282.86. Accordingly the cause will be remanded to that court, with directions to carry its said decree, so modified, into effect.

*And it is so ordered.*

130 WEDNESDAY, *January 9th, A. D.* 1901.

AMERICAN ICE COMPANY and WILLIAM G. Johnson, Assignee, Appellants, vs. EASTERN TRUST AND BANKING COMPANY. } No. 1013, January Term, 1901.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court, in this cause, be, and the same is hereby, affirmed with costs; with the modification, however, that the amount of the indebtedness secured by the mortgage is reduced to the sum of $26,282.86, and that this cause be, and the same is hereby, remanded to the said supreme court, with directions to carry its said decree, as so modified, into effect.

Per MR. JUSTICE MORRIS.

January 9, 1901.

131 THURSDAY, *April 4th, A. D.* 1901.

AMERICAN ICE COMPANY and WILLIAM G. JOHNSON, Assignee, Appellants, vs. EASTERN TRUST AND BANKING COMPANY. } No. 1013.

On motion of Mr. Calderon Carlisle, attorney for the appellants in the above-entitled cause, it is ordered by the court that said appellants be allowed an appeal to the Supreme Court of the United States on giving bond in the sum of two hundred and fifty dollars.

132 Know all men by these presents, that we, American Ice Company and William G. Johnson assignee of American Ice Company, as principal, and American Bonding and Trust Company of Baltimore City, as surety, are held and firmly bound unto Eastern Trust and Banking Company in the full and just sum of two hundred and fifty (250) dollars to be paid to the said Eastern Trust and Banking Company, its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of April, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between the said American Ice Company and William G. Johnson assignee of said American Ice Company and the said Eastern Trust and Banking Company, a decree was rendered against the said American Ice Company and William G. Johnson assignee of said American Ice Company and the said American Ice Company and William G. Johnson assignee of said American Ice Company having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Eastern Trust and Banking Company citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, that if the said American Ice Company and William G. Johnson assignee of said American Ice Company shall prosecute their said appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

AMERICAN ICE COMPANY, [SEAL.]
By WM. G. JOHNSON, *Assignee.* [SEAL.]
WM. G. JOHNSON, [SEAL.]
*Assignee American Ice Company.*
THE AMERICAN BONDING & TRUST COMPANY OF BALTIMORE CITY, [SEAL.]
By L. O. DE LASHMUTT, *Attorney-in-Fact.*

[Seal American Bonding & Trust Company of Baltimore City.]

Sealed and delivered in the presence of—
OSCAR LUCKETT.

Approved by—
R. H. ALVEY,
*Ch. Justice of Court Appeals, District of Columbia.*

[Endorsed:] No. 1013. American Ice Company and William G. Johnson, assignee, appellants, *vs.* Eastern Trust and Bonding Company. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Ap'l 19, 1901. Robert Willett clerk.

133 UNITED STATES OF AMERICA, *ss:*

To Eastern Trust and Banking Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein American Ice Company and William G. Johnson, assignee, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 19th day of April, in the year of our Lord one thousand nine hundred and one.

R. H. ALVEY,
*Chief Justice of the Court of Appeals of the District of Columbia.*

Service this 19" day of April, 1901, is accepted.

B. F. LEIGHTON,
*Attorney for Eastern Trust & Banking Co.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 19 1901. Robert Willett, clerk.

134 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 133 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of American Ice Company and William G. Johnson, assignee, appellants *vs.* Eastern Trust and Banking Company No. 1013, January term, 1901, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 23d day of April A. D. 1901.

ROBERT WILLETT,
*Clerk of the Court of Appeals of the District of Columbia.*

Endorsed on cover: File No., 18,152. District of Columbia Court of Appeals. Term No., 95. American Ice Company and William G. Johnson, assignee, appellants, *vs.* Eastern Trust and Banking Company. Filed May 11", 1901.

# APPENDIX TO RECORD.

Filed Nov. 26, 1902.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1902.

No. 25.

AMERICAN ICE COMPANY AND WILLIAM G. JOHNSON, ASSIGNEE, APPELLANTS,

vs.

EASTERN TRUST AND BANKING COMPANY, APPELLEE.

# APPENDIX TO RECORD.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1902.

## No. 95.

AMERICAN ICE COMPANY AND WILLIAM G. JOHNSON, ASSIGNEE, APPELLANTS,

vs.

EASTERN TRUST AND BANKING COMPANY, APPELLEE.

## STIPULATION OF COUNSEL.

It is hereby stipulated between counsel for appellants and appellee that the following copy of the opinion of the Court of Appeals of the District of Columbia rendered on the decision of the first appeal in this case to that court shall be taken and considered as part of the record herein on this appeal.

WILLIAM G. JOHNSON,
*Counsel for Appellants.*

BENJAMIN F. LEIGHTON,
*Counsel for Appellees.*

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

---

EASTERN TRUST AND BANKING COMPANY

*vs.*

AMERICAN ICE COMPANY.

---

AMERICAN ICE COMPANY

*vs.*

EASTERN TRUST AND BANKING COMPANY.

---

Nos. 800 and 801. Submitted January 19, 1899.
Decided February 28, 1899.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

These are cross-appeals; the first by the Eastern Trust and Banking Company, and the second by the American Ice Company, and William G. Johnson, assignee of the latter company, from a decree passed on the bill filed by the first named appellant, for the purpose of foreclosure by sale of certain mortgaged premises, situate in the City of Washington, and for the appointment of a receiver, and also for an account of rents and profits; and for certain insurance money received by the defendant William G. Johnson, as the assignee of the defendant Ice Company.

Both of the corporations concerned are corporations of the State of Maine, and the mortgage was made in that State, and was made to embrace and operate upon certain real estate situated in the County of Penobscot, State of Maine, and also certain real estate situate in the City of Washington, District of Columbia. The mortgage or deed of trust was made by the American Ice Company to the Eastern Trust and Banking Company, to secure the payment of certain bonds, amounting in the aggregate to $40,000, payable in several instalments of $5,000 each, in from three to ten years from the 1st of December, 1889. The bonds were all made payable to the complainant, the Trust Company, or bearer, and were by it, in accordance with the authority given, sold and delivered to various persons, for full value before maturity.

The property embraced in this mortgage or deed of trust, made on the 2d of December, 1889, to secure the bonds so issued, consisted of certain real estate in the county of Penobscot, Maine, improved by ice houses, and the engines, machinery and appliances usually employed in harvesting ice in that State; and also of certain real estate, that it claimed to own, in the City of Washington, District of Columbia, located opposite square No. 270 of said city, and being entirely within the limits of the bed of the Potomac River. This latter mentioned property was improved by wharf and ice houses used for storing and distributing the ice gathered in the State of Maine, and shipped to this District for sale. The mortgage or deed of trust contained the provision usually found in deeds of the kind, that the grantor therein should retain possession of the premises conveyed until default in the payment of the principal or interest of said indebtedness, or in the maintenance of insurance, or the payment of taxes upon said real estate. It was further provided, that if default should be made by the American Ice Company in the payment of the said bonds or any of them, as they became due and payable, and such default should continue for ninety days, then the whole amount of principal and interest thereon remaining unpaid, should be deemed immediately due and payable, and it should be lawful for the trustee, the complainant, to enter and take possession of said property for the purpose of sale.

The sale of the property as directed by the mortgage or deed of trust was required to be made at public auction in the City of Bangor, upon such terms as to credit, partial credit, and security for payment, as the grantee in the deed might think proper or expedient, having first given public notice of the time and place of the sale or sales, by advertisement printed not less than once a week for four successive weeks in one or morenewspapers printed and published in the City of Bangor and also in the City of Washington. It also provided that the trustee should have the right to adjourn the sale or sales from time to time, in its discretion, giving reasonable notice of such adjournment, etc., and after such adjournment to make the sale at the time and place designated by the notice of adjournment, and that no

other notice should be required. The trustee was authorized to convey to the purchaser the premises sold, and to apply the proceeds of sale, first, to defray the expenses of sale, together with its just and lawful charges for services and expenses, including reasonable allowance for attorney and counsel fees, and also all advances and expenses reasonably incurred by the trustee in operating, maintaining, or managing the property or business of the Ice Company while in possession thereof, and all payments made by the trustee for taxes, assessments, insurance and other proper charges upon said property; and the balance of such proceeds to be paid over ratably to and amongst the parties holding the bonds and coupons, etc. And, further, that the bondholders, or any number of them, or any person in their behalf, should have the right to purchase at any such sale made as aforesaid.

The mortgage or deed of trust contains a specific covenant, that the American Ice Company, the mortgagor, would and should pay all taxes and assessments, etc., and would and should keep said mortgaged property *at all times insured* in such insurance companies as might be approved by the trustee, in such amounts as *should reasonably protect all the insurable property*, payable, in case of loss, to the trustee as its interest might appear. "In case of loss the insurance money may *be applied by the trustee toward the renewal of, or addition to, the property destroyed or injured*, or, at the the option of the trustee, the money may either be retained and invested in such securities as it approves, as a sinking fund for the redemption of the bonds when due, or be applied to the payment of the principal of such of the bonds as may be at the time due and unpaid," etc.

The first instalment of the bonds secured by the mortgage fell due in December, 1892, and was paid, together with the interest then accrued and due upon all of the bonds. The next instalment became due in December, 1893, but was not paid at maturity, nor was the interest paid. Before this default, but after the American Ice Company had become insolvent, that is to say, on the 13th of October, 1893, the Ice Company made a general assignment of all its property and effects to the defendant, William G. John-

son, for the benefit of *all its creditors*. This assignment was accepted by Johnson, and by virtue thereof he leased the property of the Ice Company, located in the City of Washington, being the property embraced in the mortgage or deed of trust, to Edward M. Willis, on the 29th of January, 1894, for one year, for a rental of $130 per month. The rent accruing until the property was burnt down was received by the assignee Johnson, who still holds the same subject to the final decree in this case. All the improvements upon the property were destroyed by fire on the 11th of February, 1896.

After the default in payment in principal and interest and upon request of the requisite number of the bondholders, the mortgaged property, as well that located in the City of Washington as that located in Penobscot County in the State of Maine, was advertised to be sold at public auction in the City of Bangor, on the 9th of May, 1894, and in the advertisement it was stated that the terms and conditions of sale would be announced by said trustee at the time and place of sale. The terms were announced, but no sufficient bid being received at that offer. the sale was postponed to the 8th of June, of the same year, to take place at the place where the first offer was made. Notice of this postponement appears to have been duly given. In accordance with the notice of postponement, the property was offered a second time, but no adequate bid was received, and the sale was again postponed to the 8th of September, 1894, upon due notice thereof given. At this last postponed offer of the property, it appears, bids were received for both parcels of property, that located in Maine, and that located in the City of Washington, and that both properties were bid in by a committee representing the bondholders. The property in Maine was struck off to such committee, as the highest and best bidders, at and for the sum of $14,500 (*sic*)*; and that the Washington property was struck off to the same bidders at and for the sum of $14,000 (*sic*)†; but that the sale of the latter property has never been perfected, and has been abandoned by the committee, and consequently it still re-

* $14,000 in record (Rec., pp. 5, 66, 81).
† $14,750 in record (Rec., pp. 5, 66).

mains in the trustee under the deed of trust, undisposed of, and liable to sale for the benefit of the bondholders. There was no conveyance made by the trustee company to the committee of bondholders as purchasers of the Maine property, and the same was held by the trustee, and was rented out, and the rents received by it, until March, 1897, when the property was sold to the Consolidated Companies of New York, for the sum of $16,500; and the committee of bondholders and the Trust Company joined in the conveyance to make title. The rents and profits of the property, in the meantime received by the Trust Company, have been accounted for. And the proceeds of the sale made to the Consolidated Companies, together with the rent received, after deducting what are claimed as proper expenses, disbursements, and commissions, for administration, have been distributed to the bonds *pro rata*, paying 39 per cent. of the face of the bonds, leaving 61 per cent. still due and owing, besides interest. This is according to the statement of the complainant, the Trust Company, the correctness of which, however, is in several respects controverted by the defendants.

Some time after the general assignment of the Ice Company to the defendant Johnson, the latter as assignee took out several policies of insurance on what he claims as his own interest, as such assignee, in the property located in Washington, to the amount of $3,000. The improvements on the property, as we have already stated, were totally destroyed by fire, in February, 1896. The insurance money has been paid over to Johnson as assignee, who was at the time of the insurance, and for some time thereafter had been, in the possession of the property. The premiums on the policies of insurance were paid out of the assets of the American Ice Company. The money received on the policies is held by the assignee Johnson, to abide the final determination of this case.

The bill of complaint, after setting out at length and in great detail, the alleged facts of the case, prayed: (1), For the appointment of a receiver to take charge of the property in this District; (2), That the defendant Johnson, as assignee of the Ice Company, be required to account to the complain-

ant, the Trust Company, for the rents, income and profits derived from the property in this District from the time of notice served and demand made for the possession of the property, and his refusal of such demand, to the time of accounting; (3), That said Johnson as assignee be required to pay into the registry of the court, to abide the final decree in the case, the money received from the insurance companies on the policies of insurance obtained by him on the property in this District, which was destroyed by fire, and that the complainant be decreed to be entitled to a lien or equitable right to such insurance money for the better security of the said bonded indebtedness; (4), That a decree of foreclosure by sale be passed, and that the property be sold for the payment of the balance of the mortgage debt; and for general relief.

The defendants, the American Ice Company, and Johnson, the assignee, by their answers, whilst admitting most of the facts alleged by the complainants, strongly controvert the right of the complainant to the relief sought by it. They deny the right to have a receiver appointed, and to any account for rents received, or for the insurance money received by Johnson, the assignee; and they deny the right to a decree for sale or foreclosure of the premises situate in the City of Washington, until an account be regularly taken of the money received for sale and rent of the property situate in the State of Maine. They also question the validity of the sale of the property situated in Maine.

The court below, by its decree, denied all the relief prayed for by the complainant, except the right of foreclosure and sale of the mortgaged premises, for the payment of a balance due of the bonded indebtedness of $21,350, with interest thereon from the 2d day of December, 1892, as ascertained and declared by the decree, without the statement of any preliminary account; and a decree of sale was passed, and trustees to make the sale were appointed. From this decree both parties have appealed.

1. The first question is, Whether a receiver ought to have been appointed? We entirely agree with the court below that the facts of this case did not warrant the appointment of a receiver. As stated in the decree, it is shown that all

the improvements on the realty had been destroyed by fire, and that there was no rent or income receivable from the property. There was nothing, therefore, to create a necessity for the office of a receiver. But apart from this, the mortgage itself had provided a summary mode of taking possession and disposing of the property, in default of payment by the mortgagor. There is no charge of willful waste of the property, and the power given by the mortgage to the trustee "to enter upon the premises or property granted, and to take possession of the whole or any part thereof, and to sell and dispose of all and singular the premises," etc., would seem to render it entirely unnecessary that a receiver should be interposed. After the lapse of ninety days from the time of default made, this summary and speedy remedy was open and available to the complainant. It is a well settled principle that a receiver will not be appointed when the mortgagee, or a trustee representing mortgage bondholders, has a complete and adequate remedy at law in respect to the possession and of the matters on account of which the appointment of a receiver is sought. Therefore, if the mortgage authorizes the trustee upon a default to take possession and to collect all tolls, rents and profits of the mortgaged premises, a receiver will not be appointed for the mere purpose of obtaining possession pending a foreclosure suit, when it is not shown that the trustee has attempted to obtain possession of the property by entry or by suit at law. Jones Corp. Bonds and Mortgages, Sec. 436. In this case, it is shown that, after default, there was an attempt to obtain the possession by the Trust Company, but by process and in a manner not authorized by law. Willis *v.* Eastern Trust and Banking Company, 169 U. S. 295. That attempt, therefore, was entirely abortive, because not within the power given by the mortgage.

It is the settled doctrine, therefore, resulting from the principles just stated, as very clearly enunciated by Mr. High, in his work on Receivers, Sec. 555, that "the aid of an injunction and a receiver will not be granted in a contest concerning the possession of real property, when adequate redress may be had at law in the usual forms of action appropriate to such end; and in all such cases, equity will

leave the parties to pursue their legal remedy." The whole question as to the state of facts that will or will not justify the appointment of a receiver in respect to the contested possession of real property, is thoroughly discussed, upon full review of the decisions, by Mr. High, in his valuable work on Receivers, in Chap. XIV; and especially in cases of the character of the present, in Sections 555 to 567.

But independently of the grounds just stated for the refusal to appoint a receiver, there is still another ground, and that is, that before the bill in this case was filed, the case instituted by the United States, under a special act of Congress, against Morris and others, known as the Potomac Flats Case, in which the title to the property here in controversy is involved, was pending in the Supreme Court of this District; and before this case was decided by the court below, the Potomac Flats Case had been decided, and the title to the particular property here in question had been adjudged to be in the United States. An appeal from that decree had been taken to the Supreme Court of the United States, and that appeal has been recently argued, but the case has not yet been decided, and, consequently, the decree appealed from still remains in full force. While that decree remained unreversed, it could hardly have been expected that the court below would have appointed a receiver to claim possession of the premises in hostility to the title adjudged to be in the Government of the United States. This of itself would have been sufficient ground upon which to refuse the appointment of a receiver.

2. The next question presented is that in regard to the rents received by the assignee Johnson from the tenant of the property here in Washington City, before the improvements on the property were destroyed by fire; the complainant claiming to be entitled to those rents from the expiration of the ninety days' notice given and demand made for the surrender of the premises, under the Landlord and Tenants' Act of this District, that is to say, ninety days after the 30th of July, 1894, to the time of filing the bill. That proceeding, however, was ultimately held by the Supreme Court to be wholly without warrant of law. Willis *v.* Trust and Banking Company, *supra*. That demand, there-

fore, was not a legal demand for the surrender of the premises, within the power given by the mortgage of entry and possession, in order to make sale under the power. And not being entitled to the possession under the proceeding taken, the complainant as mortgagee was not entitled to the rents of the property; for until the mortgagor, or its assignee, *had been lawfully dispossessed*, it was entitled to receive the rents and profits of the mortgaged premises. This is the established doctrine. Wilder *vs.* Houghton, 1 Pick. 87; Mayo *vs.* Fletcher, 14 Pick. 525; Russell *vs.* Allen, 2 Allen, 42; Watts *vs.* Coffin, 11 John. 495; Chinnery *vs.* Blackman, 3 Douglass, 391; Hughes *vs.* Edwards, 9 Wheat. 500.

In the case of Teal *vs.* Walker, 111 U. S. 242, the Supreme Court of the United States, in considering this question, say:

"We believe that the rule is, without exception, that the mortgagee is *not entitled* to demand of the owner of the equity of redemption the rents and profits of the mortgaged premises, until he takes *actual possession*. In the case of Moss *vs.* Gallimore, 1 Doug. 279, Lord Mansfield held, that a mortgagee, after giving notice of his mortgage to a tenant in possession holding under a lease older than the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to that which accrues afterwards. This ruling has been justified on the ground that the mortgagor, having conveyed his estate to the mortgagee, the tenants of the former became the tenants of the latter, which enabled him, by giving notice to them of his mortgage, to place himself to every intent in the same situation towards them as the mortgagor previously occupied. Rawson *vs.* Eicke, 7 Ad. & El. 451; Burrows *vs.* Gradin, 1 Dowl. & L. 213.

"Where, however, the lease is *subsequent* to the mortgage, the rule is well settled in this country, that, as no reversion vests in the mortgagee, and no privity of estate or contract is created between him and the lessee, he can not proceed, either by distress or action, for the recovery of the rent. Mayo *vs.* Shattuck, 14 Pick. 533; Watts *vs.* Coffin, 11 John. 495; McKircher *vs.* Hawley, 16 Id. 289; Sanderson *vs.* Price, 1 Zabr. 637; Price *vs.* Smith, 1 Green's Ch. 516." The same principle is laid down in Bacon's Abridgment, Tit. Mortgage C., and in 4 Kent. Com. 157.

And in the case of Willis *vs.* Eastern Trust and Banking Company, 169 U. S. 295, the case involving the right of the present complainant to proceed under the Landlord and Tenants' Act to recover the possession of the mortgaged premises, the Supreme Court say:

"Until the mortgagee takes *actual possession*, the mortgagor is not liable, without an express covenant to that effect, to pay rent, and is entitled to take the rents and profits to his own use. (Citing Teal *vs.* Walker, *supra*, and Freedman's Sav. Co. *vs.* Shepherd, 127 U. S. 494, 502.)

"The result is that the plaintiff is not entitled to maintain this process, but must be left, so far as the aid of a court of justice is requisite to secure the rights conferred by the mortgage, to the appropriate remedy of a writ of ejectment, or a bill of foreclosure. Comp. Stat. D. C., Ch. 48, Sec. 1; Ch. 55, Sec. 10; Hogan *vs.* Kurtz, 94 U. S. 773; Hughes *vs.* Edwards, 9 Wheat. 489."

The complainant never having received the actual possession of the property, it has no claim to the rents and profits that have been received by Johnson, as assignee of the Ice Company, and therefore the court below was quite right in decreeing that the complainant was not entitled to any accounting for and in respect to such rents.

3. The next question is as to the liability of Johnson as assignee of the Ice Company to account for and pay over, for the benefit of the bondholders, the insurance money received by him as assignee of policies obtained by him on the mortgaged property, with assets derived from the Ice Company, the mortgagor. Johnson claims and contends that this insurance was not obtained in execution of the covenant contained in the mortgage, for the benefit of and as additional security to the bondholders, but was obtained by him as assignee for the benefit of the creditors generally of the Ice Company, including, of course, the bondholders as part of such creditors. But the complainant contends that whatever may have been the intention or understanding of Johnson as assignee, in obtaining the policies and paying the premiums for the risks out of the assets of the Ice Company, he was only doing what his principal or assignor was bound to do by the covenant in the mortgage, and that the

insurance money, in contemplation of both law and equity, inures, by way of priority, to the bondholders, under the covenant. It is certainly true, that Johnson does not occupy the position of a *bona fide* purchaser without notice. He is in the shoes of the Ice Company, and can occupy no better position than the assignor itself, with respect to the property assigned. His relation to the assignor is of a representative nature. By taking the assignment for the benefit of all the creditors, he did not extinguish or modify the covenant to insure, nor did he relieve the property of the charge to sustain, at all times, the insurance on the property for the protection and as an additional security of the bonds held under the mortgage. The insurance was a part, and a very important part, of the scheme of security for the redemption of the bonds; and as such it should not be impaired or avoided by placing the property in the hands of an assignee. The property itself was charged with the obligation of maintaining the insurance, and Johnson taking the property in his representative capacity, and placing himself in the position of his assignor, took the property *cum onere*. Having assets of his assignor sufficient to pay the premiums for the insurance required by the covenant, a court of equity would compel him to effect and maintain the insurance as required by the covenant. This principle is well illustrated by the case of Holmes *vs.* Buckley, Equity Cases, Abridged, 26. In that case an assignee in fee was compelled by a court of equity to fullfil the covenant made by his assignor, to keep open and in repair a water course, granted by the latter out of the land. And when a covenant is capable of running with the land, its burden will, of course, pass to the assignee of the legal estate, although merely a trustee; but equity in this, as in other cases, considers him as a mere instrument, and holds the parties really benefited as the parties answerable. Berry *vs.* McMullen, 17 Sergt. & R. 84.

But it is contended on the part of the defendants, Johnson and the Ice Company, that a covenant to insure and keep insured improvements on real estate, is a mere personal covenant, and does not attach to and run with the land. This, as a general proposition, may be conceded. But whether a covenant to insure and keep insured buildings on

real estate runs with the land or not depends upon the special object and terms of the covenant. There is no doubt that it is entirely competent to the parties by apt and express terms, to charge such covenant upon the land, and to make it run with the land and to create a burden thereon in the hands of grantees or assignees; and if it can be done by express terms, there is no reason for saying that it can not be done, upon fair and reasonable implication, to accomplish the objects and purposes of the parties. The object of the covenant in this case is plain enough, and so the terms in which it is expressed. The American Ice Company expressly covenants to keep the property *at all times insured*, in such amounts as shall *reasonably protect* all the insurable property, payable, in case of loss, to the trustee, as its interest should appear; and in case of loss the insurance money might be applied by the trustee *toward the renewal of or addition to the property destroyed or injured*, or it might be, at the option of the trustee, placed in a sinking fund for the redemption of the bonds.

It is very clear, that, by the terms of the covenant, it had relation to the land, and its principal object was to keep and maintain the buildings on the property in condition for carrying on the ice business. This was the great object of the insurance required, as means of security to the bondholders. Without this, the property, by fire, might be rendered of little value, and the bondholders be left without security. By means of the insurance it was intended that the property should be maintained as security; and hence it was provided, primarily, that the insurance money might be expended in renewal of or adding to the buildings. In such cases it has been repeatedly held, that the covenant does run with the land, at least in an equitable sense; and where an insurance has been obtained, though by an assignee, and a fire has occurred, and the insurance money has been received, a court of equity has held that the insurance money should be applied for the benefit of those for whose protection the original covenant was made.

In the case of Vernon *vs.* Smith, 5 Barn. & Ald. 1, 7, an action at law, it was held that a covenant to insure against fire of the premises situated within the weekly bills of mor-

tality, as prescribed by the statute, was a covenant that ran with the land,—the insurance money being required to be expended in restoring or repairing the building. In that case, Lord Chief Justice Abbott, said: "A covenant to lay out a given sum of money in rebuilding or repairing the premises, in case of damage by fire, would clearly be a covenant running with the land, that is, such a covenant as would be *binding on the assignee of the lessee*, and which the assignee of the lessor might enforce. Here the defendant does not covenant expressly in those words, but only that he will provide the means of having 800*l.* ready to be laid out in rebuilding the premises in case of fire. But connecting that covenant with the act of Parliament, the landlord has a right to say that the money, when recovered, shall be so laid out. It is, therefore, as compulsory on the tenant to have the money laid out in rebuilding, and as beneficial for the landlord, as if the tenant had expressly covenanted that he would lay out the money he received in respect of the policy upon the premises. For these reasons, I think that this is a covenant running with the land," etc. And the other judges of the King's Bench concurred in that opinion.

In the well known case of Thomas *vs.* Vonkapff, 6 Gill & John. 372, the principle is applied to a state of facts somewhat different but analogous to the facts of the present case; but the principle would seem to be fully applicable to the facts here presented. There the mortgagor covenanted that he would at all times during the existence of the mortgage lien, at his own proper cost and charge, cause and procure the insurance on the premises against loss by fire, already effected, to be kept up and renewed; and that, in case of loss by fire, the sum insured to be immediately applied to rebuilding, replacing, and putting the said property in good order and condition, so that the mortagee, his heirs, etc., shall, in case of loss by fire, be benefited by such insurance, or participate in the benefit thereof, to the extent of his aforesaid lien. On that state of case, it was held that the covenant to insure or keep insured did run with the land; and that the design of the covenant was, by the insurance, always to have a fund for re-establishing the premises, so that the security should not be in any manner diminished. That

the insurance was one for the benefit of the mortgagee, to the extent of his lien; and that as the mortgaged property was clothed with a trust in reference to this fund, the legal representatives of the mortgagor must also take it subject to the trust. And the court in its opinion said: "When the mortgagor received the insurance money, a court of equity would have considered him in the light of a trustee of the fund, and would have caused the whole of it, or such parts thereof as might be necessary to restore the premises to their former situation, to be expended in rebuilding. The mortgagee had undoubted rights in the fund thus arising, which could not be overreached by Thomas or his creditors, and if the property was thus clothed with a trust, his legal representatives must also take it subject to the same trust." And in concluding their opinion the court say: "We have said that although a lien existed, it gave no right to the possession of the fund, as against Thomas; the design being to apply it for the purpose of reinstating the premises. But the facts show that the lien can not in the terms of the contract be specifically enforced, owing to the sale of the mortgaged premises. A court of equity, however, is not on this account powerless. It must administer relief in the only manner in which it can now be done. As the leading object in effecting the insurance was exclusively a beneficial one to the mortgagee, its great spirit and object will be effectuated by decreeing him the fund. The mode only, of giving relief, will be changed, and that has become inevitable."

In the present case, unlike the case just referred to, the covenant requires the money, in case of loss by fire, to be paid over to the trustee, to be by it applied in the manner prescribed.

In the case of Wheeler *vs.* Insurance Co., 101 U. S. 439, it was held by the Supreme Court to be a well settled principle, by many decisions in this country, that if the mortgagor is bound by covenant or otherwise to insure the mortgaged premises, *for the better security* of the mortgagee, the latter will have *an equitable lien* upon the money due on the policy taken by the mortgagor to the extent of the mortgagee's interest in the property destroyed; and the court cites with approval, and in support of the proposition stated, the case

of Thomas' Admr. *vs.* Vonkapff's Exr., 6 Gill & John. 372.

The case of *In re* Sands Ale Brewing Co., 3 Biss. Rep. 175, is quite in point with the present case. There the Brewing Company had borrowed money and gave a mortgage of its property to secure payment. The mortgage contained a covenant requiring an insurance to be made and the policy to be assigned to the mortgagee; and that in the event that the premises should be injured or destroyed by fire, the mortgagee should have the right to collect the insurance money and apply it, in his discretion, either in the discharge of the mortgage debt, or in repairing or rebuilding the buildings injured or destroyed. The insurance was made and assigned as required by the terms of the covenant. And when the policy expired, a new policy was taken out, but not assigned to the mortgagee. The mortgagor had become bankrupt, and the buildings were destroyed by fire, and the assignee in bankruptcy had collected a part of the insurance money, and denied the right of the mortgagee to receive it. Whereupon the trustee under the mortgage or deed of trust filed a petition, asking that the insurance money, so collected and held by the assignee in bankruptcy, should be required to be paid over to the trustee to be applied in satisfaction of the mortgage debt. That application was granted, the court holding that the mortgagee was entitled to the fund. And in the course of its opinion, the court said: "The assignee in this case can hold nothing that the grantor in the trust deed could not have held, if bankruptcy had not intervened. His relation is purely representative. Creditors who have trusted the bankrupt must be held to have done so with full notice of the covenant to insure, and of the legal and equitable effect of the covenant. The covenant to insure runs with the land as much as a covenant to repair and rebuild, or for another term."

The same principle, though predicated of facts somewhat different, is announced in the cases of Miller *vs.* Aldrich, 31 Mich. 411; Ellis *vs.* Crutzinger, 27 Mo. 311; Nichols *vs.* Baxter, 5 R. I. 491; Masury *vs.* Southworth, 9 Ohio St. 348. The fact that the insurance was taken out by the assignee for the benefit of all the creditors of the assignor, and not by the assignor itself, can, as is shown by some of the

cases referred to, make no manner of difference. If the insurance had been obtained by the Ice Company, instead of its assignee with the assets of the former, there could be no question of the right of the bondholders to have the money applied, as required by the covenant, as against the general creditors of the mortgagor. If the covenant runs with the land, as the authorities would seem to make clear, and the assignee took the property subject to that charge, though he may have taken out the policies for the professed benefit of all the creditors, including the bondholders, yet, by force of the covenant, the bondholders are entitled to priority in the application of the fund. We are of opinion, therefore, that the court below was in error in denying the right of the bondholders to this insurance fund.

4. With respect to the question made as to the validity of the proceedings of the trustee in selling or attempting to sell the property situate in Maine, and the application of the proceeds of that sale, we shall not go into any extended examination. There is no fraud charged, and no such irregularities shown, as furnish the foundation for impeaching the fairness and good faith of the sale that was ultimately made. The deed of trust was made in Maine, and the sale of the property, situated in that State, was made there; and we must suppose, in the absence of any affirmative evidence to the contrary, that the sale was legally and fairly made. Both the law of the contract, and of the *situs* of the property sold, was that of Maine; and it does not appear that the sale has ever been questioned in that jurisdiction. We must therefore assume that the sale was validly made, according to the law and practice of that State.

But the question of the distribution and application of the proceeds of sale, may affect, under the terms of the deed of trust, the American Ice Company and its general creditors, claiming under the general assignment to Johnson. Hence they have a right to a strict account of the proceeds of sale of the property in Maine. As to what allowances for disbursements, expenses, commissions, etc., are proper, will be for the court here to decide, in order to make proper distribution of the proceeds of sale of the property in this jurisdiction. That such exhibits should be made, and a proper

account stated as preliminary to the decree of sale of the property here, we think is proper and necessary. Until this account is stated it can not be determined with certainty for what amount the decree for foreclosure and sale should be passed, or what amount of indebtedness is still due.

The sale of the property, however, under any decree that may be passed, should not be allowed to be made until after the case of Morris and others *vs.* United States, known as the Potomac Flats Case, now pending in the Supreme Court of the United States, shall have been decided; for otherwise the sale of the property made subject to the final decision of that case, could not be other than a mere speculation, and would most likely result in obtaining nothing more than a mere nominal sum.

Upon review of the whole case, we are of opinion that the decree of the court below must be reversed on both appeals, and the cause be remanded for further proceedings; and that the costs of said appeals be equally divided between the parties appellants, and that they pay accordingly; *and it is so ordered.*

*Decree reversed and cause remanded.*

13241

Office Supreme Court U.S.
FILED
NOV 26 1902
JAMES H. McKENNEY,
Clerk.

No. 95.
Brf. of Johnson for Appt.

Filed Nov. 26, 1902.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1902.

**No. 95.**

AMERICAN ICE COMPANY AND WILLIAM G. JOHNSON, ASSIGNEE, *Appellants,*

*vs.*

EASTERN TRUST AND BANKING COMPANY, *Appellee.*

## BRIEF FOR APPELLANTS.

WM. G. JOHNSON,
*Counsel for Appellants.*

LAW REPORTER PRINT, WASHINGTON, D. C.

13245

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1902.

**No. 95.**

AMERICAN ICE COMPANY AND WILLIAM G. JOHNSON, ASSIGNEE, *Appellants*,

*vs.*

EASTERN TRUST AND BANKING COMPANY, *Appellee.*

## STATEMENT OF THE CASE.

This is an appeal from a decree of the Court of Appeals of the District of Columbia (Rec., p. 132), affirming with modifications a decree of the Supreme Court of the District of Columbia (Rec., p. 121) in a suit for the foreclosure of a mortgage.

The Eastern Trust and Banking Company, appellee in this court, was appellee in the court below and complainant in the original proceedings in the Supreme Court of the District of Columbia, in which proceeding the appellants in this court were defendants.

For the sake of brevity the appellant, American Ice Company, will be hereinafty styled the Ice Company, the appellant, William G. Johnson, Assignee, the Assignee, and the appellee, Eastern Trust and Banking Company, the Trustee, for such it was in the mortgage to which reference is hereinafter made.

On December 2, 1889, the Ice Company, a corporation

organized under the laws of Maine, executed a mortgage to the Trustee, a corporation under the laws of Maine, to secure certain bonds of the Ice Company in the sum of $40,000 (Rec., pp. 21–29).

By said mortgage the Ice Company undertook to convey to the Trustee certain property on the Penobscot river in the State of Maine, and also certain property in the city of Washington, opposite square two hundred and seventy in said city, and lying between said square and the Potomac river (Rec., pp. 23–24) in trust—

> "for the equal pro rata benefit and security of the holders of the above mentioned bonds at whatever period the same may be issued without any preference or priority of one bond over another and for the uses and purposes hereinafter declared" (Rec., p. 25).

It is further provided in said mortgage that in the event of default by the Ice Company under the mortgage that the Trustee shall have the right to sell the whole or any part of the property—

> "at *public auction* in said Bangor, upon such terms as to credit, partial credit and security for payment as it may think proper or expedient, having first given public notice of the time and place of the sale or sales by advertisement printed not less than once a week for at least four successive weeks in one or more newspapers printed and published in said Bangor and also in Washington aforesaid" (Rec., pp. 25–26).

The deed also gives to the Trustee authority to adjourn any such advertised sale from time to time, in its discretion, giving reasonable notice of each adjournment, and after so adjourning, *to make the sale at the time and place to which the same may be adjourned* (Rec., p. 26).

It is further provided that:

> "Any sale made as aforesaid shall be a perpetual bar both at law and in equity against the American

> Ice Company and all persons claiming by, through or under it, from claiming the property, rights, interest and franchises so sold, or any interest therein. And for the purposes aforesaid the party of the second part and its successors in the trust are hereby constituted irrevocably the attorney of said American Ice Company" (Rec., p. 26).

The Ice Company also covenants in said mortgage—

> "To keep said premises and property at all times insured in such insurance companies as may be approved by the trustee in such amounts as shall reasonably protect all the insurable property, payable in case of loss to the trustee as its interest may appear" (Rec., p. 27).

It also contains a provision that—

> "The trustee shall not be liable for any neglect, mismanagement or misfeasance of any of its or their agents, attorneys or servants in relation to taking possession of, controlling, operating, managing *or selling* the premises or property aforesaid when said agents and servants have been selected with reasonable care" (Rec.. pp. 27–28).

The bonds secured by the mortgage were one hundred and seventy-six in number, fifty-six in the sum of five hundred dollars each and one hundred and twenty in the sum of one hundred dollars each, all of said bonds being made payable to the Trustee in the mortgage or bearer (Rec., pp. 21, 22).

As appears by the mortgage deed the property in the District of Columbia was acquired by the mortgagor, the Ice Company, from one Edward M. Willis, on December 2, 1889 (Rec., pp. 24–25). The mortgage deed contains no covenants of warranty as to the title, although, as appears by the averments of the bill, the property was included in the claim of the Government in what is known as the Potomac Flats Case (Rec., p. 8).

On the 13th of October, 1893, the Ice Company executed and delivered in due form of law a deed of assignment of all of its property to William G. Johnson, the Assignee, in trust for the equal benefit of all of its creditors (Rec., p. 4).

On the 30th of July, 1894, the Trustee served a landlord and tenant notice upon the assignee and his tenant Willis, demanding the delivery of the possession of the property in Washington to the Trustee, and subsequently on the 8th of September, 1894, undertook to sell the Washington property to a committee of persons acting for the bondholders secured by the mortgage (Rec., pp. 16–17).

The tenant of the Assignee having refused possession and filed a plea of title before the justice of the peace (Rec., pp. 12–13), the proceedings for possession were removed into the Supreme Court of the District of Columbia (Rec., p. 14), and were tried before Mr. Justice Bradley upon an agreed statement of facts (Rec. p. 15), who rendered judgment in favor of the Assignee (Rec., p. 32) for the reason set forth in his opinion (Rec., pp 33–36). From this judgment the Trustee took an appeal to the Court of Appeals (Rec., p. 32), which court reversed the judgment of the Supreme Court of the District of Columbia and entered judgment in favor of the Trustee on June 3, 1895 (Eastern Trust and Banking Company *vs.* Willis, 6 App. D. C. 375). This judgment was subsequently reversed by this court (Willis *vs.* Eastern Trust and Banking Company, 169 U. S. 295).

In November, 1895, the Assignee, being the grantee of the equity of redemption of the Ice Company and in possession of the premises as such grantee, took out fire insurance on the improvements on the property in Washington, as the owner of such equity of redemption, in the amount of $3,000 (Rec., pp. 7, 41).

On the 11th of February, 1896, the improvements covered by this insurance were destroyed by fire. The insurance companies denied all liability under their policies because at the time of issuing the same they were not advised of

the nature of said Assignee's title and of the incumbrance on the property, but subsequently voluntarily paid the amount to said Assignee (Rec., p. 38), who was at the time of the insurance and for some time theretofore had been and at the time of the fire was in possession of the said property covered by said insurance.

On the 25th of March, 1896, the original bill in this cause was filed (Rec., p. 1), in which the Trustee abandons the alleged sale of the property situated in the District of Columbia, of September 8, 1894, and seeks to have a foreclosure of the mortgage. In the 14th paragraph of said bill it is alleged that after default in the payment of the second instalment of bonds, and after the interest on the bonded indebtedness had continued unpaid for more than ninety days, the bondholders—

> "or those holding more than fifty per centum of the total face value thereof, directed the plaintiff company as trustee to proceed in the execution of said trust in accordance with the terms and provisions thereof. In pursuance of such direction and *in strict conformity with the terms of the power of sale contained in said mortgage*, said trustee advertised for sale and sold the property in said mortgage embraced and described at public auction at Bangor, Maine, on September 8th, 1894, to a committee acting for said bondholders" (Rec., pp. 4–5).

It is further averred in said paragraph that the portion of the real and personal property in Maine was sold for the sum of fourteen thousand dollars, and the property located in the District of Columbia for the sum of fourteen thousand seven hundred and fifty dollars (Rec., p. 5).

The said bill further avers that the said committee have never perfected their purchase of the Maine property and that no deed has passed to them, but that they are ready and tender themselves ready to comply with the terms of sale, and that the complainant is ready on its part and that *the said sale is in fact completed*, and that there will be real-

ized therefrom after deducting proper charges the sum of nine thousand one hundred and seventy-three dollars and sixty-eight cents to be credited upon the bonded indebtedness (Rec., p. 5).

The bill also avers that the sale of the Washington property—

> "Was made upon the condition and with the understanding between the purchasers and the trustee that the trustee should obtain for them possession of the property before the sale should be closed or considered complete" (Rec., p. 5).

The bill further avers that owing to the failure of the complainant to obtain possession of the real estate in Washington the purchasers had refused to comply with the terms of said sale and that said sale of said Washington property made at Bangor was therefore a nullity (Rec., p. 6).

The bill further alleges that the Assignee—

"*Acting for and in place of said American Ice Company*" (Rec., p. 7), procured policies of insurance against loss or damage by fire on part of the improvements of the real estate in Washington in three fire insurance companies in the sum of one thousand dollars each; that the said policies of insurance were in full force and virtue on the 11th of February, 1896, when the said improvements were totally destroyed by fire, and claims that the complainant is entitled to the proceeds of said policies by reason of the covenant for insurance in the mortgage deed (Rec., p. 7).

The bill further avers that the property in Washington is included in the claim of the United States Government in what is known as the Potomac Flats Case, in which said case the claim of title on the part of the Government had recently been sustained by the Supreme Court of the District of Columbia, and that an appeal had been taken—

> "On behalf of the parties in possession to the Supreme Court of the United States where the same is now pending; that at the time said mortgage was

executed said decision by the Supreme Court of the District of Columbia had not been made and that the effect thereof has been to greatly diminish, if not to destroy, the marketable value of the property affected, and, if said decision is affirmed by the Supreme Court of the United States, will render parties in possession liable to eviction by the United States" (Rec., pp. 8–9).

The bill prayed for the appointment of a receiver, that the defendant, Assignee, be required to account to the complainant for the rents of the property, that the complainant as Trustee be declared entitled to the proceeds of the insurance policies upon the improvements; for the foreclosure of the mortgage and sale of the Washington property, and for general relief (Rec., pp. 9–10).

The answers of the Ice Company and the Assignee, so far as material to be considered here, denied knowledge of the amount of the indebtedness due under the mortgage and required proof thereof (Rec., p. 39, 40, 45). They also denied all knowledge of the alleged sale of the property in the State of Maine and demanded strict proof thereof (Rec., p. 40, 45). They also denied that the Assignee had taken out insurance in pursuance of the mortgage for the benefit of the Trustee, but on the contrary averred that the Assignee had merely taken out insurance upon his separate interest as owner of the equity of redemption for the benefit of all the creditors of the Ice Company, secured and unsecured (Rec., pp. 38, 41, 46, 47).

The answer of the Assignee further sets up that the insurance was not taken out until after the Trustee had claimed to have extinguished the mortgage by a sale of the property (Rec., p. 47).

The answers of said defendants admit that in the case of the United States *vs.* Morris et al., commonly known as the Potomac Flats Case, a decree of the Supreme Court of the District of Columbia had adjudged the title to the real estate in Washington, embraced in the mortgage, to be the prop-

erty of the United States and that an appeal from that decree had been taken to this court. The said defendants averred that the Trustee had never taken any steps in said litigation to maintain its alleged title to the property in these proceedings and had failed to contribute to any of the cost of the litigation or in any way to defend the title in said proceedings, although requested so to do; and that the whole cost and labor of the defense of the property in said proceedings had been borne exclusively by the Assignee (Rec., pp. 43–48).

The said answers also averred that by the proceedings of the Trustee and the bondholders the title of the defendant Assignee to all of the property in Maine had been defeated, so that as such Assignee he had recourse only to the property in Washington, while the Trustee as mortgagee had recourse to both properties; and the answers also averred that the defendants were entitled to have the assets marshalled, and that before the Trustee could have recourse to the property in Washington it should bring in for resale the property in Maine in the interest of all of the creditors (Rec., pp. 44–48, 49).

The cause came on for final hearing before Mr. Justice Cox in March, 1898, when a decree was entered (Rec., pp. 74–76), by which the court denied the application for a receiver; denied that the complainant was entitled to the proceeds of the insurance taken out by the defendant as Assignee on his equity of redemption in the improvements; decreed the amount of the indebtedness due under the mortgage, and a sale of the premises.

From this decree the Trustee and the defendants, the Ice Company and the Assignee appealed to the Court of Appeals (Rec., p. 76).

Upon that appeal the Court of Appeals affirmed so much of the decree of Judge Cox as denied the appointment of a receiver and an accounting of the rents, but reversed so much of the decree as adjudged the insurance money to the

defendant Johnson, as assignee of the equity of redemption, and also reversed so much of the decree of Judge Cox as found the amount of indebtedness, and directed that the cause be remanded for an accounting with respect thereto. The Court of Appeals affirmed the right of the complainant to a foreclosure and a sale of the property, but directed that (App. to Rec., p. 18):

> "The sale of the property, however, under any decree that may be passed should not be allowed to be made until after the case of Morris and others *vs.* United States, known as the Potomac Flats Case, now pending in the Supreme Court of the United States shall have been decided; for otherwise the sale of the property made subject to the final decision of that case, could not be other than a mere speculation and would most likely result in obtaining nothing more than a mere nominal sum."

After the cause was remanded to the Supreme Court of the District of Columbia by the Court of Appeals, and on August 29, 1899, depositions were taken by the Trustee (Rec., pp. 81–108), and on September 27, 1899, on motion of the Trustee, the cause was referred to the auditor "to ascertain and report the amount due on the bonds secured by the deed of trust in these proceedings described" (Rec., p. 108).

On the 7th of February, A. D. 1900, on motion of the Trustee, the foregoing order was amended so that the auditor was directed—

> "to state the account of complainant, as trustee, under the deed of trust in complainant's bill described, and to ascertain and report the amount of the indebtedness still due upon said bonds under said trust" (Rec., p. 109).

On March 23, A. D. 1900, the auditor filed his report (Rec., pp. 109–118), to which no exceptions were filed by any of the parties to the cause. On the 24th of April, A. D.

1900, the complainant, by an order to the clerk, directed the cause to be calendared for hearing at the next (May) term (Rec., p. 119).

No notice of this order to calendar was given, as required by equity rule sixty-four of the Supreme Court of the District of the Columbia, and the appellants had no knowledge of the order until May 9, A. D. 1900 (Rec., p. 120).

On May 14, A. D. 1900, the appellants moved the court to strike the case from the calendar and for leave to take testimony (Rec., pp. 119–120), which motion was not granted, but was overruled by the final decree (Rec., p. 121), from which an appeal was taken by the Ice Company and the Assignee to the Court of Appeals (Rec., p. 123).

On January 9, 1901, the Court of Appeals affirmed the decree of the Supreme Court of the District of Columbia, except as to the amount of the indebtedness due on the mortgage, which it reduced to the sum of $26,282.86 (Rec., p. 132).

From this decree the Ice Company and the Assignee prosecuted their appeal to this court (Rec., p. 132).

---

## ASSIGNMENT OF ERRORS.

I.

The court erred in decreeing the proceeds of the insurance policies to the complainant.

II.

The court erred in not remanding the cause to the court below for further proceedings in that court, because the decree of that court was passed prematurely and without right, the cause having been calendared for hearing without notice and heard before the same was at issue and ready for hearing.

III.

The court erred in decreeing a sale of the property pending further proceedings in the cause of the United States *vs.* Morris, known as the Potomac Flats Case.

IV.

The court erred in not requiring the complainant to make contribution to the costs of the litigation affecting the title to the property in the case of United States *vs.* Morris, commonly known as the Potomac Flats Case, and in not remanding the cause for proof on that subject.

V.

The court erred in not dismissing the bill, because of the inequitable conduct of the Trustee in the attempted execution of the trusts.

---

I.

**The Court Erred in Decreeing the Proceeds of the Insurance Policies to the Complainant, Trustee.**

The deed of trust contained a covenant on the part of the mortgagor, the Ice Company, to keep the property insured to the satisfaction of the mortgagee, the indemnity if any to be paid to the mortgagee as interest may appear, and by the mortgagee to be applied *at its option*, either to the restitution or repair or extension of the improvements, or to be invested and held as security for the debt, or applied to its liquidation (Rec., p. 27).

The insurance policies were not taken out by the mortgagor, nor upon the mortgagor's interest, but only upon the equity of redemption owned by the Assignee (Rec., pp. 38, 47).

The Assignee, representing general creditors and being the owner in fee of the equity of redemption had an insurable interest in the property separate and distinct from that of the Trustee under the mortgage and it was that interest which the Assignee undertook to insure.

In the case of Insurance Co. *vs.* Stinson, 103 U. S. 25, a creditor of the mortgagor claiming a mechanic's lien on the mortgaged premises took out insurance upon this property for his own benefit. Suit was brought upon the policy, and this court in its opinion thus states the instruction given by the court below (p. 27):

> "The court further instructed the jury in substance that if the plaintiff had such builder's lien when the policy was effected, which could have been enforced by the decree of the appropriate court, and by virtue of which he could have recovered the equity of redemption on that property, then he was entitled to recover, without regard to the question what his equity of redemption might or might not have realized at an auction sale; that if a party has a valid and subsisting second security for a given amount, and he enters into a contract of indemnity against the destruction of that security, and a loss by fire occurs, both parties having full knowledge of the state of the property and the title when the contract is entered into, such insurance would cover that second security, although by the subsequent course of events the older and prior security might have swept away the value of the second."

Commenting thereon the court says (p. 28):

> "As to the other question, relating to the insurable interest of the plaintiff, we think that the charge given was equally free from exception. There is no doubt that the owner of the property had an insurable interest to the extent of the value of the building notwithstanding the existence of a mortgage on the property of sufficient amount to absorb it."

And in summing up this branch of the case, the court says (p. 29):

> "The principle asserted in these remarks, as well as the reason of the thing, leads to the conclusion that the owner of an equity of redemption has an insurable interest equal to the value of the insurable property embraced therein, whether he is personally liable for the mortgage debt or not. His interest arises from his ownership, carrying with it the incidental right of redeeming the property from the incumbrances on it. If he is also personally liable for such incumbrances, it only makes his interest more direct and exacting."

In United States *vs.* American Tobacco Company, 166 U S. 468, this court reaffirmed that ruling, saying (p. 479):

> "An owner has an insurable interest in his property to the extent of the value of the building on it, notwithstanding the existence of a mortgage on the property sufficient to absorb it. Per Bradley, J., in Insurance Co. *vs.* Stinson, 103 U. S. 25, 29; May on Insurance, Secs. 81, 82. The amount of interest or its character is not material in determining the question whether a party who attempts to recover under a policy has an insurable interest."

In the case of Wheeler *vs.* Insurance Company, 101 U. S. 439, Johnson & Goodrich, creditors of a mortgagor who had, in his mortgage, covenanted to insure for the benefit of the mortgagee, but had not so insured, insured the mortgagor's equity of redemption for their own benefit, charging the insurance premiums to the mortgagor. The mortgagees claimed the insurance fund; but this court held that the creditors had the right to take out such insurance for their own benefit and to satisfy their debt from the proceeds in advance of the mortgagees.

In Wainer *vs.* Milford Mut. Fire Ins. Co., 153 Mass. 335, the court states the doctrine of insurable interest thus (p. 341):

> "Insurance against loss by fire is a personal contract of indemnity. If a person has such an interest in property that he will suffer pecuniary loss by its destruction, he has an insurable interest."

At the time of the insurance and of the fire the assignee in this case was in possession of the property on which the insurance was effected and of its rents and profits (Rec., pp. 6, 7).

That possession was adjudged rightful by this court.

> Willis *vs.* Eastern Trust and Banking Co., 169 U. S. 295.

The rightfulness of his perception of the rents and profits was also sustained by Justice Cox in the Supreme Court of the District (Rec., p. 75) and by the Court of Appeals (Appendix to Rec., p. 11).

The assignee being the grantee of the equity of redemption, rightfully in possession and rightfully in the reception of the rents and profits, obviously had an insurable interest, distinct from that of the mortgagee, and the Supreme Court of the District, by Mr. Justice Cox so decreed (Rec., p. 75).

The Court of Appeals, however, reversed this ruling upon the grounds set forth in its opinion on the first appeal (Rec., p. 131, Appendix to Rec., pp. 11–17).

In that opinion the Court of Appeals say (App. to Rec., p. 12):

> "It is certainly true, that Johnson does not occupy the position of a *bona fide* purchaser without notice. He is in the shoes of the Ice Company, and can occupy no better position than the assignor itself, with respect to the property assigned. His relation to the assignor is of a representive nature. By taking the assignment for the benefit of all the creditors, he did not extinguish or modify the covenant to insure, nor did he relieve the property of the charge to sustain, at all times, the insurance on the property for the protection and as an additional security of the

> bonds held under the mortgage. . . . The property itself was charged with the obligation of maintaining the insurance, and Johnson taking the property in his representative capacity, and placing himself in the position of his assignor, took the property *cum onere*."

It may be freely admitted that so far as his title to the real estate is concerned the assignee stood in the place, by representation, of his grantor. But he also represented creditors, unsecured as well as secured, *with respect to funds upon which the mortgagee had no lien under the mortgage*, and it is submitted that with those funds he could do, for the benefit of the creditors, anything which they could do for themselves.

This court has held, as shown in the cases cited above, that a creditor has an insurable interest in the equity of redemption of his debtor's mortgaged estate. If the creditors had this interest and could lawfully insure the same, why could not the assignee do so for them? He is certainly their representative, and exclusively their representative as to funds not impressed with the lien of the mortgage.

The theory upon which the learned Court of Appeals denied this right to the creditors acting through their representative, the assignee, is, that the mortgagor's covenant to insure is a covenant *running with the land*, and upon the conveyance of the land to the assignee he became charged with the fulfillment of that covenant, the court saying (App. to Rec., p. 17):

> "*If the covenant runs with the land, as the authorities would seem to make clear*, and the assignee took the property subject to that charge, though he may have taken out the policies for the professed benefit of all the creditors, including bondholders, yet, *by force of the covenant*, the bondholders are entitled to priority in the application of the fund. We are of opinion, therefore, that the court below was in error in denying the right of the bondholders to this insurance fund."

It is respectfully submitted that in this the Court of Appeals was in error.

The covenant in this case is exclusively for the benefit of the covenantee, the mortgagee, and in no sense for the benefit of the estate. The money realized from such insurance is to be paid over to the mortgagee to be applied at *its option*, either to restoration or *additions* to improvements or *applied to the mortgage debt.*

Under this covenant, the mortgagee is in absolute control of the insurance money and can apply every dollar to the mortgage debt, leaving the mortgagor nothing with which to rebuild or repair.

As the estate of the mortgagor could derive no benefit from the insurance and the contract of insurance is itself a personal contract of indemnity against loss to the *person* and not the *thing* damnified, it seems clear, upon principle, that this covenant has none of the attributes of a real covenant or one "running with the land."

> "A covenant to insure, with a stipulation that in case of damage by fire the money to be recovered from the insurance office shall be laid out in rebuilding or repairing the premises, clearly falls within the rule laid down in Spencer's case (5 Co. 117) concerning covenants running with the land. The effect of such an insurance is not merely to put in the pocket of the person insuring, in the event of loss, the amount of the money secured, but to entitle the owner of the estate to have that money expended on the land; and if such be the operation of the covenant, it does affect the thing demised, as much as a covenant to repair or rebuild in case of damage by fire."
>
> Platt on Covenants, 183.

> "No case has decided that a mere covenant to insure, unattended by a clause for reinstating the premises with the insurance money will run with the land." Ib. 185.

> "In order then to bring a covenant within the first of these rules, it is obvious that the insurance

money must be rendered available to rebuild or repair the premises injured by fire." Ib. 186.

"If the covenant can run with the land at all it must possess that property *at law*, independently of any assistance which equity may be disposed to render a landlord. The interest derivable under the policy would, in this view of the case, constitute a fund for the mere personal advantage of the insured (The Saddler's Company *vs.* Babcock, 2 Atk. 554). Now if the insurance money be a personal compensation, and if there be not any means to secure the application of that money for the benefit of the estate, it is difficult to conceive on what grounds a general covenant to insure can be deemed to be comprehended within the above rules relating to covenants running with the land." Ib. 187.

"In framing a covenant to insure, the precaution of inserting a provision that the money recoverable from the insurance office *shall be applied* in repairing or rebuilding the premises injured or destroyed by fire, *should never be neglected*." Ib. 188.

In Cushing *vs.* Thompson, 34 Maine, 496, the court say (p. 499):

"It is well settled, that a contract of insurance does not run with the estate, as incident thereto, but is an agreement with the underwriters against a loss, which the *assured* may sustain, and not the loss which *another* may be subjected to, having an interest as mortgager, redemptioner, or otherwise."

Another essential element of a covenant runing with the land is that it shall continue to attend the estate in all its alienations and that its performance by one alienee shall not be abrogated by the mere fact of alienation. Yet such would be the effect upon insurance of the alienation by the party assured.

In Carpenter *vs.* The Providence Washington Insurance Company, 16 Pet. 495, Mr. Justice Story says (pp. 501–2):

> "If then, a mortgagor procures a policy on the property against fire, and he afterwards assigns the policy to the mortgagee with the consent of the underwriters (if that is required by the contract to give it validity) as collateral security, that assignment operates solely as an equitable transfer of the policy so as to enable the mortgagee to recover the amount due in case of loss; but it does not displace the interest of the mortgagor in the premises insured. On the contrary the insurance is still his insurance, and on his property, and for his account. And so essential is this, that if the mortgagor should transfer the property to a third person, without the consent of the underwriters, so as to divest all his interest therein, and then a loss should occur, no recovey can be had therefor against the underwriters, because the assured has ceased to have any interest therein, and the purchaser has no right or interest in the policy."

It is respectfully submitted, therefore, that upon principle, a covenant to insure, unless upon the express obligation of both parties and not at the option of either, that the insurance be expended in repairs (in which case it is a covenant to repair by particular means) is not one running with the land, but lacks the essential elements of such a covenant.

That covenants to insure, merely, are not covenants running with the land has been expressly decided by the Court of Appeals of New York in two well considered cases in which that exact question was presented.

In the case of Dunlop *vs.* Avery, 89 N. Y. 592, Chapman W. Avery, in December, 1870, executed a mortgage to Robert Dunlop for $2,000, with a covenant to insure the property in that amount and to assign the policy to Dunlop. The insurance was effected and the policy made payable to Dunlop and this condition maintained until November 16, 1874, when the policy expired. Avery then secured a new policy for $3,000 in his own name and did not assign to Dunlop. In March, 1875, Avery executed a second mortgage conveying his equity of redemption to his brother,

Egbert I. Avery, to secure Egbert I. Avery $1,400, and had the $3,000 policy indorsed "Loss, if any, payable to Egbert I. Avery, as his interest may appear." On the expiration of this policy Chapman W. Avery obtained a new policy for $2,000, payable to himself and indorsed "Loss, if any, payable to Egbert I. Avery, as his interest may appear."

The premises were destroyed by fire, and Dunlop, the first mortgagee, claimed the insurance by virtue of the covenant in his mortgage.

The Supreme Court gave judgment in favor of Dunlop, (23 Hun. 509); but the Court of Appeals reversed this decision, saying (p. 599):

> "Nor is there any force in the position that the covenant to insure runs with the land, and hence no assignment was required of the policy. In re Sands, 3 Bissell, 175, so far as it upholds such a doctrine it is not, we think, well founded. The covenant in question is *entirely personal in its character, does not affect the land or run with it and is collateral and incidental* to the remaining covenants in the mortgage. A conveyance of the land by the mortgagor *would not, we think, render the vendee liable on the covenant.*"

In Reid *vs.* McCrum, 91 N. Y. 412, Donald & Waddell, owners, had executed a mortgage to secure Reid. The mortgage contained a covenant by the mortgagors to keep the buildings insured for the benefit of the mortgagee and the policies to be assigned to him. The mortgage was duly recorded.

Subsequently they sold the property, *subject to the mortgage* and by mesne conveyance, all "in terms subject to the mortgage," McCrum became the owner of the equity of redemption and insured the property for his own benefit, but did not assign the policies to Reid. A fire occurred, and Reid set up claim to the insurance by force of the covenant in his recorded mortgage.

Counsel for Reid assailed the decision in Dunlop *vs.*

Avery, 89 N. Y. 592, as being unsound in principle and as mere *obiter*. The Court of Appeals, however, sustained and reaffirmed the doctrine in Dunlop *vs.* Avery, saying (p. 416):

> "In the case of Dunlop *vs.* Avery (89 N. Y. 592), it was held that a covenant to insure contained in a mortgage was not a covenant running with the land; that it was entirely personal in its character and did not affect the land and was collateral and incidental to the remaining covenants in the mortgage. That decision is a complete answer to the claim made by the appellant's counsel, that the covenant to insure contained in the mortgage in this case runs with the land, and the question must be regarded as *res adjudicata*, unless some reason exists why the case cited should not be followed and adhered to. Authorities are cited in support of that decision, and no doubt is expressed in the opinion in regard to the correctness of the rule there laid down, nor is there, we think, any ground for claiming that the question at issue was not involved in that case, as the point was distinctly presented, and if the covenant to insure was a covenant running with the land, then the plaintiff was clearly entitled to recover."

The court then proceeds to show that the decision in Dunlop *vs.* Avery was not *obiter* and says (p. 417):

> "Assuming, however, that the question is before us we are of the opinion, after an examination of the elaborate brief of the counsel for the appellant and the authorities cited, that the covenant in question did not run with the land. . . .
>
> (p. 418) "*A careful examination of the authorities presents no case where it has been distinctly held that a simple covenant of insurance runs with the land.*"

In the opinion delivered by the court below in this case, on the first appeal, a number of cases are cited as supporting the doctrine that this covenant is one running with the land and therefore binds the grantee of the equity of redemption, but it is respectfully submitted, with great defer-

ence to that court, that no one of the cases cited supports its position.

In Vernon *vs.* Smith, 5 Barnew. & Ald. 1, cited by the court below (App. to Rec., pp. 13, 14) the covenant to insure was not in a mortgage, but in a *lease*.

The controversy was not between a mortgagee and mortgagor or the grantee of his equity of redemption, but was an action by the *assignor of a lessor* against a *lessee* for breach of the lessee's covenant to insure.

Abbott, C. J., Bayley, Holroyd and Best, JJ., all delivered separate opinions, and *each one* grounds his opinion that the covenant in the lease was one running with the land upon the *express provisions of the statute* of 14 Geo. III, Chap. 78, which gave the owner of the land in such cases *the absolute right to have the insurance money laid out in rebuilding the premises.*

Moreover, the assignee, claiming the benefit of the covenant was not the assignee of the *land*, as in the case at bar, but the assignee of the *covenant itself*, namely of the *lease*.

There is a very obvious and palpable difference between the assignee of land *subject* to a mortgage containing covenants and the assignee of a *lease* containing covenants. The one is a conveyance of land which may or may not be bound by the covenants, and the other is the transfer of a contract, in part composed of the covenants.

In the case of Thomas' Administrators *vs.* Vonkapff's Executors, 6 Gill & J., p. 372, cited by the Court of Appeals (App. to Rec., p. 14), Thomas gave a mortgage of certain real estate to secure Vonkapff $20,000 and in the deed covenanted to keep up fire insurance on the improvements to the extent of $19,000,

> "and that in case of loss the sum insured *shall be immediately applied to the rebuilding, replacing and putting the said property and premises in the like good order and condition that the same now are in,*" etc. (p. 378).

Thomas, the mortgagor and covenantor, did take out in-

surance to the amount of $10,000; the premises were destroyed, and he deposited the insurance money with the Maryland Savings Institution with a memorandum in writing, signed by him saying (p. 374):

> "It is my intention this sum should remain in your institution until I can decide upon whether I shall have to use it for the rebuilding of my sugar refinery establishment, or have to transfer the same to the executors of the estate of B. J. Vonkapff for the payment of a mortgage held by this estate on my property."

Thus it will be seen that *Thomas, the mortgagor, took out the insurance himself, recovered the money and deposited the very check for the insurance money, impressed with an express trust in writing that it be applied for the use of the mortgagee, either in rebuilding under the covenant or as a payment on account of the mortgage debt.*

Having covenanted to insure for the benefit of the mortgagee, and having actually done so and received the insurance money, the money was in equity fettered with the trust for the mortgagee and his memorandum with the deposit, but expressed what the law imposed.

There is no room for doubt that when the mortgagor covenants to insure for the benefit of the mortgagee and does so, the insurance is additional security for the debt and belongs to the mortgagee.

It is true that the court in that case speaks of the covenant to insure as one "running with the land" because there was in the covenant the *absolute obligation to repair and rebuild*, but this was mere *obiter*. There were no facts in the case calling for the announcement or application of that principle. Thomas had not aliened the land, but owned it after the fire and up to the foreclosure sale. Had Thomas aliened the land and had his alienee taken out insurance in his own name for his own benefit as an insurance of his equity of redemption, and the mortgagee sought the benefit of such

insurance there might have been occasion to consider and determine that question, and in that connection the unconditional obligation to rebuild would have been, perhaps, controlling, but under the existing facts the question did not arise as a point for decision in the case.

Before alluding to the subject of covenants running with the land the Court of Appeals of Maryland had already sustained the right of the mortgagee upon two equally controlling grounds, each of which arose upon the record of the case before it. The question of covenants running with the land did not rise in the case and no facts existed upon which it could be raised. No conveyance of the land had been made and no person as heir or devisee of the mortgagor was before the court whom the decision of that question could in any respect bind or affect.

The proceeding was between the administrators of Thomas, the original mortgagor and covenantor, and the executors of Vonkapff, the original mortgagee and covenantee, concerning a sum of money collected by the covenantor in his lifetime as the results of his covenant performed, and by him expressly dedicated to and specially deposited for the benefit of the covenantee.

In the case of In re Sands Ale Brewing Co., 3 Biss. 175, cited by the Court of Appeals (App. to Rec., p. 16), the Brewing Company executed a mortgage for sixty thousand dollars, in which, among other things, the company covenanted to keep the improvements insured for the benefit of the mortgagee and to have the loss, if any, made payable to the trustee in the mortgage. In compliance with the covenants the mortgagor took out insurance and had the policies assigned to the trustee. When they expired new policies were taken out *by the mortgagor* but not assigned to the trustee. On the 9th of October, 1871, the buildings were destroyed by fire, the mortgagor being the owner in possession and being in possession of the policies of insurance taken out by it. *After the fire* the mortgagor became insol-

vent and these *very policies of insurance taken out by the mortgagor in pursuance of its contract*, passed by the assignment to its assignee in bankruptcy.

Here, then, it is obvious, no question as to the covenant running with the land arose. The *covenant had been performed* by the covenantor, the assignor ; the property had been insured and the fire occurred, before the assignment and the only question was whether insurance effected *by the covenantor in pursuance of the covenant* could be diverted by an assignment made after the fire.

When a covenant has been performed by the original covenantor, no question can arise as to whether an assignee of the land is also bound to perform it. The covenant was already satisfied, and the observation of the court that the covenant was one running with the land was mere *obiter*.

The true principle controlling that case, it is submitted, was the rule that equity treats as done that which is agreed to be done. The company had agreed to take out policies, and agreed to assign them to the mortgagor. It had taken them out, but had failed to assign them; but for all legal effects they were to be treated as though they had been assigned ; and the correct principle of decision in the case was expressed by Judge Blodget in that portion of the opinion in which he says (p. 180):

> "My conclusion then is, that the covenant by the bankrupt to insure operated to assign in equity to the petitioner the benefit of any insurance *effected by the bankrupt* on the mortgaged property."

Had the covenantor in that case failed to take out insurance, and had the insurance been effected by the assignee, in his own name, the question whether the covenant was one running with the land might have arisen for decision. On the facts as they existed it plainly did not arise.

In Miller *vs.* Aldrich, 31 Mich. 408, cited by the Court of Appeals (App. to Rec., p. 16), one Chapman, being in-

debted to Miller, *orally agreed* to give a mortgage on real estate and as the land alone was insufficient also *orally agreed* to keep the building insured for Miller's benefit. Chapman actually took out insurance for the full value of the property for the benefit of the mortgagee. He subsequently aliened the property subject to the mortgage, and *upon a distinct agreement with the alienee, as part of the contract of sale, that the alienee would continue the insurance for the benefit of the mortgagee*, and turned over to his alienee the existing insurance policy, which was made payable to the mortgagee, and which had six years of the seven years of the mortgage yet to run. The alienee delivered up the policy to be cancelled and took a new policy in his own name; and subsequently, when the mortgagee expressed apprehension about his security, *assured the mortgagee that the property was insured for his benefit.*

It does not appear whether the mortgage contained any covenant to insure, but as appears by the opinion of Graves, Ch. J. (413): "The mortgage is not in evidence," and of course no question as to a covenant running with the land was decided or considered in the case. It did appear to the satisfaction of the court, that the *owner of the equity of redemption*, as a part of the contract of purchase, *agreed to insure* the mortgagee's interest and did receive an already existing policy therefor along with the property, that he acknowledged his agreement to the mortgagee and pretended that he had fulfilled it, thereby misleading the mortgagee into the belief that he had been and would continue to be secured in that way.

Cooley, J., in his opinion, says (p. 410):

> "Miller, when he was informed what had been done, called upon Aldrich and expressed apprehension about his security, but Aldrich quieted him by assuring him that in the event of loss he should be protected by the insurance money."

In Ellis *vs.* Kreutzinger, 27 Mo. 311, cited by the court

below (App. to Rec., 16), it appears, by the report that Kreutzinger gave Ellis & Cavender a *chattel* mortgage on his stock of goods, and that (p. 312):

> "Kreutzinger also *delivered to said firm as a security for said indebtedness a policy of insurance* on said stock of goods, executed in his favor by the St. Louis Mutual Fire and Marine Insurance Company of St. Louis."

Kreutzinger was also indebted to the firm of Douglass, Gazzam & Co., and to that of Fallenstein & Gauss. The goods were lost by fire. *After the loss* an assignment of the policy was made upon the books of the company to one Meyer in trust for the two firms last named.

Suit was brought by Ellis against Meyer, to whom the company had paid, and the two firms for whose benefit the assignment of the policy was made, and the court below refused to instruct the jury that possession of the policy by Ellis was notice of an equitable mortgage in their favor upon the policy itself.

The court, in its opinion, says (p. 314):

> "The authorities are very clear that *the deposit of a policy of insurance with a creditor of the assured as a security*, collateral or original, for the debt, *gives the creditor a lien on the proceeds of the policy*, which is binding upon the underwriters and upon the assured, and upon all those who take an interest from the assured with notice of such lien.
>
> . . . . . .
>
> "It is not necessary to say that the possession of the policy by the plaintiffs and the failure of the defendants to produce it, were of themselves notice to the company that it belonged to the plaintiffs or to some one else; but it would seem to be clear that these circumstances were sufficient to put the company and the defendants upon inquiry. The evidence was that both the company and the defendants were apprised that the policy was in the hands of the plaintiffs and that they claimed an interest in it."

In the case of Nichols *vs.* Baxter, 5 R. I. 491, cited in the opinion of the court below (App. to Rec., p. 16), Baxter had given Nichols a mortgage for two hundred and fifty dollars, and in the mortgage had covenanted to keep the premises insured in not less than that amount for the benefit of the mortgagee. At the time of executing the mortgage Baxter had an insurance policy for the amount of two hundred and fifty dollars for a term of seven years, the mortgage debt being payable in one year. Baxter never assigned the policy to the mortgagee. Subsequently the premises were destroyed by fire and the insurance company was ready to pay the loss to any one entitled to receive it. Baxter being called upon by Nichols, the mortgagee, to give him an order upon the insurance company for the amount of the loss, refused to do so, and, as stated in the report (pp. 492–3):

> "Not pretending that the complainant was not entitled to it according to the contract between them, but that, from neglect to obtain an assignment of the policy, the complainant was without remedy, and that he, Baxter, had obtained an advantage which he would not relinquish. After several attempts on the part of the complainant to adjust the matter with Baxter, which failed, the complainant gave notice to the Insurance Company of his equitable claim to the amount due upon the policy, who thereupon refused to pay it either to the complainant or Baxter without being, for the sake of a legal discharge, compelled so to do. Baxter then assigned the policy to a creditor, one William Dwyer, who had, previous to receiving the assigment, notice of the claim of the complainant."

The mortgagor had actually insured the premises himself, but had not aliened the land, thus raising no question as to the effect of his covenant. But he undertook, *after the fire*, to assign *the policy itself*, which he had agreed to take out for the benefit of the mortgagee and had actually taken out, over to another in fraud of the mortgagee's right.

The case of Masury *vs.* Southworth, 9 Ohio St. 341, the last case cited by the court below (App. to Rec., p. 16), was, like Vernon *vs.* Smith, 5 Barnew. & Ald. 1, an action by the assignee of the lessor against an assignee of the lessee for breach of the contract to insure. The lease contained covenants to build, keep in repair and keep insured, and were part of the consideration. The thing assigned was not the land or an equity of redemption therein but a *lease*. The contract of letting, *containing the covenants of both parties*, was the subject of the assignment but even in that case the court said (p. 349):

> "A covenant to run with the land *must have for its subject-matter something which sustains the estate and the enjoyment of it* and is therefore beneficial both to lessor and lessee. A covenant to insure which had for its object the *benefit of the lessor only, as where the money paid in the event of a loss would go to him*, has been regarded as collateral; but if the money is to be applied to repair or rebuild, then it is, in its character like a covenant to repair which may run with the land."

It is respectfully submitted that the cases cited in the opinion of the court below, do not support its position and that its conclusions are in direct conflict with both principle and precedent.

## II.

## The Court Erred in Not Remanding the Cause to the Court Below for Further Proceedings.

This cause came on first to be heard in the Supreme Court of the District at the March term, 1898, of the special term in equity, and was then disposed of by a final decree (Rec., pp. 74–76). From this final disposition of the case both parties appealed to the Court of Appeals (Rec., p. 76), and the appeal was docketed in that court May 5, 1898

(Rec., p. 79). On the 28th of February, 1899, that court reversed the decree upon both appeals and directed that "the cause be remanded for further proceedings" (App. to Rec. 18)

The cause being remanded for further proceedings, in accordance with the mandate of that court, the trustee proceeded to the taking of additional testimony, and took the depositions of witnesses in its behalf (Rec., pp. 81–108).

Subsequently, on motion of the complainant, trustee, the cause was referred to the auditor, with direction to consider the evidence on file and such additional evidence as should be adduced by the parties (Rec., p. 108), and under this reference the complainant, trustee, in November, 1899, offered further testimony before the auditor (Rec., p. 118).

Subsequently, on motion of complainant, trustee, on February 7, 1900, the former order of reference to the auditor was amended and enlarged so as to increase the scope of his inquiry and report (Rec., p. 109).

It must be observed that the reference to the auditor as originally made, and as enlarged by the amendment, was limited in its scope. It was simply—

> "to state the account of complainant, as trustee under the deed of trust . . . and to ascertain and report the amount of the indebtedness still due upon the said bonds under said trust" (Rec., p. 109).

It did not authorize the auditor to report the proper distribution of any fund in the hands of the trustee, nor to make any allowances to the appellants for anything not a payment on the bonds.

The auditor filed his report under the two orders of reference on March 23, 1900 (Rec., p. 109).

The complainant, trustee, took no further testimony, but it did not announce its case as closed; nor was any time limited by the court within which either party was to close its testimony.

On April 24, 1900, the complainant, trustee, caused an order to be entered to calendar the cause for hearing at the

May term of the Supreme Court. No notice of this order was given to defendants (appellants here), as specifically required by the rules, and the appellants had no knowledge or notice of the said proceedings until May 9, 1900 (Rec., p. 120), and on May 14, 1900, defendants moved to have the case stricken from the calendar (Rec., pp. 119–120). The calendaring of the case for hearing at the May term, and the consideration and decision of the same at that term against the objection of appellants was plainly in direct violation of the rule of court and of the rights of the appellants, and was without authority.

Equity rule sixty-four of the Supreme Court provides as follows:

> "No cause in equity shall be set down for hearing unless the same *be at issue and ready for hearing*, or be properly set down for hearing on bill and answer or bill and answer and replication; and every such cause may be ordered by either party or his counsel to be placed upon the calendar, *provided* such order be given to the clerk and *notice thereof to the opposite party* at least five days, exclusive of Sundays, previous to the first day of the next term. Any cause once properly set down for hearing and placed upon the calendar, if not disposed of by the court, shall remain upon the calendar in its proper order unless otherwise directed by the court."
>
> Rules of April, 1898, p. 68.

In their motion to strike the case from the calendar and for leave to take testimony in their behalf, the defendants, appellants here, set forth the fact that the cause had been improperly calendared and without notice to them, as required by the rule, and pointed out the matters as to which the defendants desired to offer evidence (Rec., pp. 119, 120).

The court, however, proceeded to hearing and final decree (Rec., pp. 121, 123).

The Court of Appeals sustained this action of the court below, saying:

> "If there was irregularity in the matter of calendaring the cause, which is by no means certain, it was waived or cured by the appearance of the appellants in the argument of the cause and their participation therein" (Rec., p. 129).

In this statement the court below erred as to the fact. The appellants did not participate in the argument and the record does not so state. The final decree merely recites that the cause "was argued by counsel" (Rec., p. 121), but it does not say by counsel *for appellants*. As matter of fact counsel for the appellee only argued the case and appellants' counsel did not participate in the argument or take any part in the hearing beyond being present and urging their objection to any hearing at that time.

But it is submitted that even if the record did show that counsel for appellants had participated in the argument or hearing of the case and such had been the fact, that circumstance would not have operated as a waiver of appellants' rights.

The objection presented a question going to the jurisdiction of the Supreme Court of the District, in special term, to hear the case, and that objection having been properly made, the appellants, had they seen fit to do so, were then at liberty to proceed with the hearing without waiving their objection, for so this court has repeatedly ruled.

In Harkness *vs.* Hyde, 98 U. S. 476, this court, by Mr. Justice Field, says (p. 479):

> "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. *He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality,* that the objection is deemed to be waived."

In Southern Pacific Co. *vs.* Denton, 146 U. S. 202, this court, through Mr. Justice Gray, says (p. 206):

> "Neither the special appearance for the purpose of objecting to the jurisdiction, *nor the answer to the merits after that objection had been overruled*, was a waiver of the objection—"

and repeats the foregoing language quoted from the case Harkness *vs.* Hyde.

In Mexican Central Railway *vs.* Pinkney, 149 U. S. 194, this court again approved this doctrine, saying (p. 209):

> "In Harkness *vs.* Hyde, 98 U. S. 476, it was held by this court that illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; *nor after such motion is denied by his answering to the merits.* Such illegality is considered as waived *only* when he, *without having insisted upon it*, pleads in the first instance to the merits."

It is respectfully submitted that the complainant trustee, having taken one year from the remanding of the cause in which to submit its evidence, could not, without announcing its evidence as closed and without notice to the defendants, cut off their right to offer testimony on their behalf by calendaring the cause for hearing without notice and in violation of the express rules of the court, which is precisely the effect of what was done.

## III.

## The Court Erred in Decreeing a Sale Pending the Litigation in the Potomac Flats Case.

When this case was disposed of on the first appeal the Court of Appeals said:

> "The sale of the property, however, under any decree that may be passed, should not be allowed to be made until after the case of *Morris and Others* v.

> *United States*, known as the Potomac Flats Case, now pending in the Supreme Court of the United States, shall have been decided; for otherwise the sale of the property made subject to the final decision of that case, could not be other than a mere speculation, and would most likely result in obtaining nothing more than a mere nominal sum" (App. to Rec., p. 18).

That decision was rendered on February 28, 1899 (App. to Rec., p. 2), and the decision of the "Potomac Flats Case" by this court was rendered May 1, 1899 (174 U. S. 196).

The decree of the Supreme Court of the District authorizing the sale of the property was entered May 15, 1900 (Rec., p. 121), and affirmed by the Court of Appeals January 9, 1901 (Rec., p. 132).

In its opinion, affirming this decree of sale notwithstanding the fact that the litigation in the Potomac Flats Case was still pending and the interest of the appellants still unascertained, the Court of Appeals says (Rec., p. 130):

> "After being remanded, however, the Potomac Flats Case seems to have been consigned to the limbo of dead issues, and *no attempt, at all events no serious attempt, seems ever to have been made by anyone to resuscitate it* from its condition of suspended animation."

After further observations upon the conduct of these appellants in the Potomac Flats Case, the Court of Appeals says (Rec., pp. 130–131):

> "The direction in our former opinion in this case, that there should be no sale until after the determination of the Potomac Flats Case, was manifestly intended for the benefit of all the parties to this cause, and most of all for the benefit of the appellants. But if the appellants *by their continued inaction refuse to procure the desired determination of their interest*, and at the same time refuse to put the appellee in such position as that it may act in its place in that case, it can not thereby be permitted to defeat the just rights

> of the appellee. And it can not complain if the appellee is thereby remitted to the speedy execution of the mortgage to which it is entitled. We have no doubt that, *if the appellants persist in their course of inactivity in the Potomac Flats Case*, there will be no difficulty in substituting a purchaser at a sale under a decree in this case in its place and stead, to ascertain the value of the interest in controversy."

It is respectfully submitted that the assignee, who is in responsible charge of the rights of the appellants in the Potomac Flats Case is not fairly subject to the censure implied in these observations of the court below.

The record is absolutely silent as to what had or had not been done by the appellants in the Potomac Flats Case since the decision by this court, and the reason there is no such evidence is that the appellants were denied the opportunity for offering any by the calendaring and hearing of the cause in violation of their rights and of the rules of the Supreme Court of the District.

It is not the fault of the appellants that the complainant trustee was not a party to the Potomac Flats Case. It had the same right and opportunity to be made a party to that proceeding that appellants had, and in that event could have been one of the appellants to this court in that case. It preferred, however, not to avail itself of that right and opportunity, but to leave the burden and cost of that litigation wholly to these appellants.

The decision of this court in the Potomac Flats Case defeated the titles of all parties whomsoever to the property the subject of the mortgage, but saved *to the appellants in that case* the right to recover unascertained and undefined compensation for improvements made by them within the *locus in quo* which could only be ascertained and made definite through the further proceedings prescribed by this court.

The only thing, if anything, to which the complainant,

trustee, can have right by virtue of its mortgage would be the ultimate recovery in these proceedings. A sale of that possible, ultimate recovery at auction under a foreclosure sale could not be other than a speculative sale, while the mortgagor and owner of the equity of redemption are manifestly entitled to have applied to the mortgage debt whatever may ultimately be recovered in that proceeding.

The suggestion, in the opinion of the court below (Rec., p. 130) that the recovery in those proceedings may not be sufficient to satisfy the claims of the mortgagee and other creditors, and that, therefore, the—

> "Ice Company therefore has probably no motive of self-interest to move for the ascertainment of the value of its interest in the property in controversy;"

ignores the fact that the appellants are interested in securing in that proceeding, as a credit on the bonded indebtedness, if for no other purpose, the largest possible sum, and that they are fairly entitled to that advantage.

## IV.

## The Court Erred in Not Requiring the Complainant Trustee to make Contribution to the Costs of the Litigation in the Case of the United States v. Morris, known as the Potomac Flats Case, and in Not Remanding the Case to the Supreme Court of the District for that Purpose.

The act of Congress approved August 5, 1886 (24 Stat. 335), entitled "An act to provide for protecting the interests of the United States in the Potomac River Flats, in the District of Columbia," made it the duty of the Attorney General to institute, as soon as may be, in the Supreme Court of the District, a suit against all persons and corporations who might have, or pretend to have, any right, title, claim or interest in any of the land or water described in the act,

"for the purpose of establishing and making clear the right of the United States thereto."

The third section of the act made the decree in said suit final and conclusive upon all parties to the suit and also upon all persons and corporations—

> "who shall fail, after public notice as hereinbefore in this act provided, to appear in said court and litigate his, her or its claim, and they shall be deemed forever barred from setting up or maintaining any right, title, interest or claim in the premises."

The property involved in this proceeding was acquired by the Ice Company in December, 1889 (Rec., pp. 24–25), and the mortgage given to the trustee on the same day (Rec., pp. 21–29), and at the time was claimed by the United States in what is known as the Potomac Flats Case (Rec., p. 8). So that both mortgagor and mortgagee took whatever rights they obtained subject to that act of Congress and the proceedings instituted thereunder.

The complainant trustee never appeared in said cause, never took any part in said proceedings, nor ever did anything to maintain the title thereto, nor bore any part of the costs thereof, though requested to do so, and the costs and labor thereof were wholly borne by the assignee (Rec., pp. 43, 48, 120).

By the decree in said Potomac Flats Case, passed October 17, 1895 (Morris *vs.* United States, 174 U. S. 196) the title of the United States was declared to be absolute as against all the defendants to that cause, and—

> "against all persons whomsoever claiming any rights, titles or interests therein who have failed to appear and set forth and maintain their said rights, titles or interests as required by said act of Congress."
>
> 174 U. S. 216.

The effect of this decree was, as alleged in the bill, practically to destroy the property embraced in the mortgage (Rec., p. 8).

The assignee of the Ice Company prosecuted an appeal from said decree to this court (174 U. S. p. 218) and upon the hearing the said decree was affirmed, but the cause was remanded to the Supreme Court of the District for further proceedings, this court saying (p. 291):

> "It is not disclosed in this record whether it is the design of the Government, on taking possession of the wharves and buildings belonging to the appellants, to continue them in the use of the public or to supersede them by other improvements. Whatever may be the course pursued in that respect, it should not deprive the appellants of the right conferred upon them by the act of Congress to have the value of their respective rights, titles, interests or claims ascertained and awarded them.
>
> "As to the method to be pursued in valuing property of so peculiar a character, the cases of The Monongahela Nav. Co. *vs.* United States, 148 U. S. 312, and Hetzel *vs.* Baltimore & Ohio Railroad, 169 U. S. 26, may be usefully referred to."

It is thus seen that all that remains of the property embraced in this mortgage is what may be recovered in the further prosecution of that proceeding, *by the assignee*, as the judgment of this court only remanded the cause in so far as the "*appellants*" then before it were concerned.

As the complainant, trustee, took its mortgage during the pendency of that proceeding, with full knowledge that the title was in litigation, and without any covenants to defend the title on the part of the mortgagor, the mortgagor and the assignee of its equity of redemption were under no obligation to conduct said litigation for its benefit; but if the result of the assignee's labor and expense in the original proceedings, in the prosecution of the appeal and in the further proceedings, are to enure to the benefit of the trustee by virtue of its mortgage and the foreclosure sale thereunder, it is but just and reasonable that the trustee should bear a part of such expense in proportion at least to the advantage it derives therefrom.

V.

**The Court erred in not Dismissing the Bill Because of the Inequitable Abuse of its Trust by the Trustee.**

An examination of the record will show that the complainant, trustee, has so inequitably abused its trust as to forfeit all right to relief in a court of equity.

It is to be remembered that two properties were conveyed by the mortgage—one in Bangor, Maine, and the other in the District of Columbia (Rec., pp. 23, 24), and that by the action of the trustee, the right of the assignee to the equity of redemption in the property in Bangor was defeated (Rec., pp. 43–4, 48–9, 91, 92).

It thus had a lien upon two properties, to only one of which the assignee had right of recourse and it was therefore bound to exhaust its rights in the Maine property before resorting to that in Washington. And in this connection it was bound to proceed in fairness to both mortgagor and mortgagee, and to pursue, strictly, the powers given by the deed of trust.

In the fifth paragraph of its bill which was filed in March, 1896 (Rec., p. 1) the complainant, trustee, makes the following averments (Rec., pp. 4–5):

> "In pursuance of such direction and *in strict conformity with the terms of the power of sale contained in said mortgage, said trustee advertised for sale and sold the property* in said mortgage embraced and described *at public auction*, at Bangor, Maine, on September 8th, 1894, to a committee acting for said bondholders as follows: The portion of said real estate and personal property and property rights situate in the State of Maine, *for the sum of fourteen thousand dollars.*
>
> . . . . . .
>
> "That the said committee have never perfected their purchase of the said Maine property and no deed has

passed to them thereunder, but that *they tender themselves ready and plaintiff is ready on its part to comply with the terms of said sale, and that the same is in effect completed* and that *there will be realized therefrom*, after deducting the trustee's commissions and certain necessary disbursements and expenses and the reasonable costs and expenses of said sale in conformity with the provisions of said trust, *the sum of nine thousand one hundred and seventy-three dollars and sixty-eight cents* ($9,173.68) to be credited upon the residue unpaid of said bonded indebtedness and interest."

Here was a positive averment by the trustee, under the oath of its secretary, George B. Canney (Rec., p. 11), that in September, 1894, it had, *in strict conformity* with the power of sale in the mortgage, sold the Maine property *at public auction for fourteen thousand dollars*, and that there would be distributable therefrom to the bondholders, as a credit on the mortgage debt, the *sum of nine thousand one hundred and seventy-three dollars and sixty-eight cents.*

The basis of the Trustee's bill is thus seen to be that there has been a valid, public sale, at auction, of the Maine property in strict conformity with the powers under the trust, the proceeds of which were insufficient to satisfy the mortgage debt and the Trustee therefore had the right to have recourse to the Washington property.

*It was for the deficiency arising from that sale that this foreclosure was sought* and it is obvious that if the alleged sale of the Maine property was invalid, the bill in its present form could not be sustained.

The answers of the defendants deny all knowledge of this alleged sale, and demand strict proof thereof (Rec., pp. 40, 45), thus putting in issue the basic principle of the bill.

The facts with respect to said alleged sale as established in this record, not by controverted testimony, but by the evidence in behalf of the Trustee itself are, that there was no such sale as is alleged in the bill, but only a pretended and fictitious auction sale; that the property was secretly sold at

at *private* sale in March, 1897, more than a year after the filing of the bill, for a much larger price; that instead of receiving *fourteen thousand dollars*, through the administration of the trust it received *twenty-one thousand eight hundred and thirty-three dollars and seventeen cents* (Rec., pp. 115, 116); that instead of having *nine thousand one hundred and seventy-three dollars and sixty-eight cents* for credit on the mortgage debt, it had *sixteen thousand three hundred and forty dollars and forty-two cents* (Rec., pp. 116, 117).

A very full and lucid statement of the transactions of the trustee will be found in the report of the auditor (Rec., pp. 109–115), and in his statements of account, schedules A and B (Rec., pp. 115–118).

The court's careful consideration of this report is earnestly solicited since it is the only judicial analysis contained in the record of the facts relating to this extraordinary transaction.

By the testimony taken in behalf of the trustee, before the first hearing it appeared that the trustee had duly advertised all the real estate covered by the deed of trust for sale, to take place in Bangor, Me., on the 9th day of May, 1894; and in said advertisement it was stated that the terms and conditions of said sale would be announced by said trustee at the time and place of the auction sale (Rec., pp. 59, 60).

The sale was postponed to the 8th of June, 1894 (Rec., p. 59), and again postponed to the 8th of September, 1894 (Rec., pp. 59, 60), of which due notice was given.

On the last named day a pretended auction sale was held in a room of a hotel in the city of Bangor, Maine, at which the property in Washington was first offered for sale, and then the property at Hampden. The only terms of sale announced at the auction were those contained in a certain paper writing, marked Complainant's Exhibit 1 (Rec., p. 60), which paper was read at the sale, and was the only announcement of the terms of sale made at any time or place (Rec., pp. 53, 69). These terms were:

"One-third of the purchase-mony is to be paid in cash, one-third in one year with interest, and one-third in two years with interest, interest to be payable semi-annually; the payments in one and two years to be secured by mortgages upon the property sold, with proper provisions in said mortgages to insure the prompt payment of taxes on the said property, and that the buildings on said property shall be kept covered by insurance to at least the amount due and secured by the mortgages; loss, if any, to be payable to the mortgagee to the extent of his interest, and that the buildings be kept in suitable state of repair" (Rec., p. 60).

These terms were not fixed by the trustee, but by Edward L. Stewart, J. B. Huckins and John Miller, a committee representing the holders of some of the bonds secured by the mortgage (Rec., pp. 52, 60).

No conveyance was ever made by the trustee of either property to the said pretended purchasers at any time, nor did they ever have possession of either piece of property.

No money was ever paid or notes given by the alleged purchasers at the auction sale for either property, nor was any attempt made in any way to comply with any of the terms of sale, nor was any credit of principal or interest made upon any of the bonds secured by the mortgage until March, 1897, after the private sale to the Consolidated Ice Company, when a credit of thirty-nine per cent. was made upon said bonds (Rec., pp. 66, 67).

The trustee retained possession of the property in Maine and rented it for twenty-four hundred dollars a year (Rec., p. 53), and collected therefrom in two years forty-eight hundred dollars (Rec., p. 71), and in March, 1897, one year after this bill was filed, while the cause was pending and testimony was being taken upon the issues, without any notice, John Miller sold the Maine property at private sale and the trustee conveyed the same to the Consolidated Ice Company for sixteen thousand five hundred dollars cash (Rec., pp. 69, 70).

A partial statement of disbursements and claims was given by the trustee containing certain claims for disbursements from March 22, 1894, to November 8, 1895 (Rec., pp. 55–57), and in the testimony of George B. Canney, secretary of the trustee, given in November, 1896, it is stated that the trustee makes a claim of two thousand dollars, under the indefinite statement "for anything that it will go in for" (Rec., p. 54). He also states that the company will make a further claim for an additional allowance against the mortgagor (Rec., p. 55).

After the cause had been remanded by the Court of Appeals upon the first hearing, further evidence was taken in behalf of the Trustee (Rec., pp. 81–108, 118), which is carefully analyzed in the Auditor's report (Rec., pp. 109–115).

From this evidence it appears that the Maine property, together with ice and tools, was sold for the lump sum of $20,000 (Rec., pp. 91, 102), and by direction of the bondholders' committee; $3,500 of that was paid to the Penobscot Ice Company for the ice and tools (Rec., p. 103), with the assent of the Assignee appointed in Maine (Rec., p. 91).

None of the parties to the alleged sale of September 8, 1894, treated that transaction as a sale. The account of the Trustee, G. B. C. No. 29—Nos. 1 and 2 (Rec., pp. 104–106) show that the Trustee continued to treat the American Ice Company, the mortgagor, as owner, debiting and crediting it as such from March 22, 1894, to February 27, 1897, including rent collected and taxes and insurance paid after the alleged sale, while the only account with the bondholders of any proceeds of sale or rights thereunder begins with February 27, 1897, being "G. B. C. No. 29. No. 3" (Rec., pp. 106–7). The only credits to this account are the sale to the Consolidated Ice Company, March 5, 1897 (Rec., p. 107) and returns of premiums of unexpired insurance (Rec., p. 107) paid by the trustee in 1896 and 1897, after the alleged sale in 1894, and charged against the mortgagor in the account with it (Rec., p. 106).

It is thus obvious that the alleged sale at auction in September, 1894, the basis of the Trustees' bill was a mere ruse by an apparent formal execution of the trust to extinguish the equity of redemption of the mortgagor, and substitute, for the public sale by the Trustee, this private sale conducted wholly by three bondholders, the trustees servilely obeying their directions in all things.

Such a pretended sale it is submitted can not operate as a valid execution of the trust as the rule is that a power of sale under a mortgage must be exercised strictly as prescribed in the mortgage deed.

Indeed, so strictly has the rule been applied that even the omission to comply with a provision prescribing acts to be done *after* the sale will render the sale void.

In Smith *vs.* Provin, 4 Allen, 516, which was a bill to redeem the mortgagor gave the mortgagee a power of sale but provided that the mortgagee selling—

> "should make affidavit of his proceedings under the power and that the affidavit should be so made and recorded in the registry of deeds for the county of Hampden *within one year after the sale.*"

The mortgagee made the sale, but did not make and record the affidavit until *three* years later.

The court held the sale to be a nullity, saying (p. 518):

> "The mortgage to Gillett was dated March 13, 1856, and contained a power of sale, in case of the default of payment of a certain sum of money therein named. Such power of sale may be annexed to a mortgage and a sale made in strict conformity to its provisions will bar the equity of redemption and convey a good title to the purchaser. It is by force of this power of attorney and proceedings under it that the defendant Provin claims an indefeasible title in the premises now sought to be redeemed. The allegation on the part of the plaintiff is, that the conditions annexed to the power of sale have not been complied with. The defect particularly assigned is,

> that the affidavit required to be made by the party making such sale, and containing a statement of a compliance with the requirements of the deed in that behalf, was not made and recorded in the registry of deeds for the County of Hampden within one year after the sale. It is admitted by the answer of the defendants that no such affidavit had been made and filed for record in the registry of deeds prior to April 21, 1862, nearly three years after the sale and long after the filing of the present bill. *There was, therefore, a failure to comply with the conditions annexed to the power of sale, and the sale must be treated as a nullity.* This court has held the rule very strictly as to mortgage sales under power of attorney. Roarty *vs.* Mitchell, 7 Gray, 244."

In this case it is to be observed that the Trustee was not only constituted the Trustee by the mortgagor to make the sale, but for said purpose is thereby "constituted irrevocably the attorney of said American Ice Company" (Rec., p. 26), and expressly exonorated from any liability for neglect, mismanagement, or misfeasance of any of its agents in relation to selling the property (Rec., pp. 27–28).

With reference to this sale in Maine of the Maine property, the Court of Appeals in its opinion on the first appeal said (App. to Rec., p. 17):

> "With respect to the question made as to the validity of the proceedings of the Trustee in selling or attempting to sell the property situate in Maine, and the application of the proceeds of that sale, we shall not go into any extended examination. There is no fraud charged and no such irregularities shown as furnish the foundation for impeaching the fairness and good faith of the sale that was ultimately made."

It is to be observed, however, that the appellants were not complainants, but defendants answering the bill, and it is not the office of an answer to charge fraud, especially where, as here, the appellants denied all knowledge on the subject.

The appellants could not obtain affirmative relief from said sale in this suit by cross-bill, since a bill for that purpose would have necessitated new parties—the alleged purchasers at the first sale.

But in view of the fact that the Trustee made that sale the basis of its suit, and no decree for a forclosure in this case could be made until the balance of the debt resulting from that sale was fixed, the complainant was bound to establish the absolute validity of that sale or to abandon it altogether.

And while it may be true that in the case then before the Court of Appeals, there were "no such irregularities shown, as furnish the foundation for impeaching the fairness and good faith of the sale" the facts subsequently established by the complainant in its attempt to state the account, did show such irregularities, and the fact that the bill claimed a sale, in strict conformity with the terms of the trust for *fourteen thousand* dollars and a balance of a little over *nine thousand* dollars, and the proof adduced, after the first appeal showed a fund of nearly *twenty-two thousand* dollars to be accounted for, and a balance of over *sixteen thousand* dollars, shows that those irregularities were fraudulent in their tendencies whether so designed or not.

It is respectfully submitted, therefore, that the bill as framed should have been dismissed unless the complainant should have elected to abandon its pretended sale of September, 1894, and to bring in the Maine property for resale under this or independent foreclosure proceedings.

It is respectfully submitted that the decree of the court below should be reversed.

WM. G. JOHNSON,
*Counsel for Appellants.*

The appellants could not obtain affirmative relief from said sale in this suit by cross-bill, since a bill for that purpose would have necessitated new parties—the alleged purchasers at the first sale.

But in view of the fact that the Trustee made that sale the basis of its suit, and no decree for a forclosure in this case could be made until the balance of the debt resulting from that sale was fixed, the complainant was bound to establish the absolute validity of that sale or to abandon it altogether.

And while it may be true that in the case then before the Court of Appeals, there were "no such irregularities shown, as furnish the foundation for impeaching the fairness and good faith of the sale" the facts subsequently established by the complainant in its attempt to state the account, did show such irregularities, and the fact that the bill claimed a sale, in strict conformity with the terms of the trust for *fourteen thousand* dollars and a balance of a little over *nine thousand* dollars, and the proof adduced, after the first appeal showed a fund of nearly *twenty-two thousand* dollars to be accounted for, and a balance of over *sixteen thousand* dollars, shows that those irregularities were fraudulent in their tendencies whether so designed or not.

It is respectfully submitted, therefore, that the bill as framed should have been dismissed unless the complainant should have elected to abandon its pretended sale of September, 1894, and to bring in the Maine property for resale under this or independent foreclosure proceedings.

It is respectfully submitted that the decree of the court below should be reversed.

WM. G. JOHNSON,
*Counsel for Appellants.*

# Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 95.

AMERICAN ICE COMPANY AND WILLIAM G. JOHNSON, ASSIGNEE, APPELLANTS,

vs.

EASTERN TRUST AND BANKING COMPANY, APPELLEE.

## STATEMENT OF THE CASE.

On March 25, 1896, the appellee exhibited its bill in the Supreme Court of the District of Columbia, holding an equity court for said District, against the appellants, The American Ice Company and William G. Johnson, its assignee, Edward M. Willis, and certain fire insurance companies of the District of Columbia, for the purpose of foreclosing a mortgage of certain real estate, for the appointment of a receiver, and for an accounting for rents and profits, and for certain insurance money received by the appellant, William G. Johnson, as assignee of the said American Ice Company. The ice and banking companies were organized under the laws of the State of Maine, and the mortgage, or deed of trust in the nature of a mortgage, was made in that State, and embraced certain real estate, situate in the county of Penobscot, State of Maine, and certain real estate, situate in this

urisdiction. The deed of trust was made by the American Ice Company to the appellee, to secure the payment of certain bonds, amounting in the aggregate to $40,000, payable in instalments of $5,000 each, in from three to ten years rom December 1, 1899. The bonds were made payable to the appellee, or bearer, and were by it, in accordance with the authority given, sold and delivered to various persons, for full value, before maturity. A portion of said property embraced in said trust, which was situated in the State of Maine, as aforesaid, was improved by ice houses, engines, machinery and appliances, such as are commonly employed n that State in the harvesting of ice. The property that it claimed to own in the District of Columbia, was located opposite square No. 270, one of the squares of the city of Washington, and was situate within the limits of the bed of the Potomac river. The last-named property was improved by a wharf and ice houses for storing and distributing the ice gathered in the State of Maine and brought here for sale.

The deed of trust provided that the grantor therein should retain possession of said property until default should be made in the payment of interest on said indebtedness, or in payment of insurance or taxes on said real estate; it further provided that if default should be made by the American Ice Company in the payment of said bonds, or any of them, in accordance with their tenor and effect, and such default should continue for ninety days, then the whole amount of principal and interest remaining unpaid, *should be deemed immediately due and payable*, and it should be lawful for such trustee to enter and take possession of said property, for the purpose of sale. By the terms of said trust, the property was required to be sold at public auction in the city of Bangor, upon such terms as to credit and payment, as the appellee might deem proper or expedient, having first given public notice of the time and place of the sale or sales by advertisements published not less than once a week for four successive weeks, in one or more newspapers

printed and published in the cities of Bangor and Washington. The power of sale in said trust further provided that the trustee should have the power *to adjourn the sale from time to time, in its discretion*, giving reasonable notice of such adjournment, *and after so adjourning, to make the sale at the time and place to which the same might be adjourned*, and *that no other or further notice should be required.* The trustee was authorized to convey to the purchaser the premises sold, and to apply the proceeds of sale, first, to pay the expenses thereof, together with its just and lawful charges for services and expenses, including reasonable allowance for attorney and counsel fees, and also all advances and expenses reasonably incurred by the trustee in operating, maintaining and managing the business of the Ice Company while in possession thereof, and all payments made by the said trustee for taxes, assessments, insurance and other proper charges upon said property; the balance of said proceeds of sale was to be paid over ratably to the parties holding said bonds. The said deed of trust provided that the bondholders, or any number of them, or any person in their behalf, should have the right to purchase, at any such sale, made as aforesaid.

The deed of trust contained a special covenant that the American Ice Company should and would pay all taxes and assessments, *and keep said property at all times insured*, in such insurance companies as might be approved by said trustee, in such amounts as should reasonably protect all the insurable property, payable in case of loss to the trustee, as interest might appear. In case of loss, the insurance money *to be applied by the trustee for the renewal of or additions to the property destroyed*, or at the option of the trustee, the money might be invested, on such security as it might approve, as a sinking fund for the redemption of the bonds when due, or—

> "be applied to the redemption of the bonds, or the principal of such of the bonds as may be at the time due and unpaid."

The first instalment of bonds secured by said trust, fell due in December, 1892, and was paid, together with the interest then accrued and due upon all the bonds. The next instalment of interest which became due in December, 1893, was not paid at maturity, nor was the interest thereon paid. Before this default, to wit, on the 13th day of October, 1893, the said Ice Company made an assignment of all its property and effects, to the defendant, William G. Johnson, for the benefit of all its creditors. This assignment was accepted by Johnson, and by virtue thereof he leased the property of the Ice Company, located in the city of Washington, embraced in said deed of trust, to Edward M. Willis, on the 29th of January, 1894, for a rental of $130 per month. The rent accruing under said lease, until the property was burned down, was received by the appellant Johnson, as assignee, as aforesaid. All the improvements upon the property situate in this jurisdiction, were destroyed by fire the 11th of January, 1896. After default in the payment of principal and interest, and upon request of the requisite number of bondholders, all the property embraced in said trust was advertised to be sold at public auction, in the city of Bangor on the 9th of May, 1894, and in the advertisement it was stated that the terms and conditions of said sale would be announced by said trustee, at the time and place of said sale. The terms were so announced, and no bid being received at that offer, the sale was postponed until the 8th of June, of the same year, to take place at the place where the first offer was made. Notice of the postponement was duly given, and in accordance with this second notice of postponement, the property was offered a second time, but no adequate bid was received, and the sale was again postponed until September 8, 1894, due notice thereof having been given.

At the last offer of the property bids were received for both parcels of property, and that situated in the city of Washington, as well as that in the State of Maine, were bid

in by a committee of bondholders. The property in Maine was struck off at such sale to the highest and best bidder, at and for the sum of $14,500; the Washington property was struck off to the same bidder for $14,000; but the sale of the latter property was never perfected, was abandoned by the committee, and consequently remained at the time of filing said bill, in the trustee under said deed of trust, undisposed of and liable to sale for the benefit of the bondholders. There was no conveyance made by the Trust Company to the purchaser of the Maine property, and the same was held by the trustee, and was rented out, and the rents received by it until March, 1897, when the property was sold to the Consolidated Companies of New York for the sum of $16,500, and the committee of bondholders and the Trust Company joined in the conveyance to make title.

The proceeds of the sale made to the Consolidated Companies, together with the rent received by the Trust Company, after deducting what it claimed for expenses, administration, etc., were by said Trust Company distributed to the bondholders pro rata, paying 39 per cent of the face value of said bonds, leaving 61 per cent still due and owing, beside interest.

Some time after the general assignment of the Ice Company to the defendant Johnson, the latter, as assignee, took out several policies, on what he claimed to be his interest as assignee in the property located in Washington, to the amount of $3,000. The improvements on the property were totally destroyed by fire, as hereinbefore stated, in February, 1896. The insurance money was paid over to Johnson, as assignee, who was, at the time of the insurance, and for some time thereafter, in possession of the property. The premiums on the policies were paid out of the assets of the American Ice Company. The money received by the said Johnson for such insurance was paid to him and held under a stipulation to abide the final determination of this case. Such, in substance, were the averments of complainants'

bill. The bill asked first for the appointment of a receiver to take charge of the property in this District; second, that the appellant Johnson, as assignee, as aforesaid, be required to account to said Trust Company for the rents, income and profits received from said property in this District, from the time of notice served and demand made for the possession of the property, and his refusal of such demand, until the time of accounting; third, that the said Johnson, as assignee, be required to pay into the registry of the court, to abide its final decree in the case, the money received from the insurance companies, on the policies of insurance obtained by him on the property in this District, which was destroyed by fire, and that the complainant be decreed to be entitled to a lien or equitable right to such money, to better secure the bonded indebtedness; fourth, that a decree of foreclosure be passed and that the property be sold for the payment of the mortgage debt, and, lastly, for general relief.

The appellants separately answered said bill, and admitted most of the facts therein alleged, but controverted the right of said Trust Company to the relief sought by it. They denied the right to have a receiver appointed, and to an accounting for rents received or for the insurance received by the appellant, the said Johnson, as assignee. They further denied the right for a decree of foreclosure and sale of the property in the District of Columbia, until an accounting was regularly taken and had for the sale and rent of the property situate in the State of Maine.

Justice Cox, who heard the case in the Supreme Court of the District of Columbia, denied all the relief prayed for by appellee, except the right of foreclosure and sale of the mortgaged premises for the payment of the balance of $21,350 on the bonded indebtedness, with interest thereon from the second day of December, 1892, as ascertained and declared by said decree, without the statement of any preliminary account. Sale was decreed and trustees appointed

to make said sale. From that decree both parties appealed to the Court of Appeals of the District of Columbia.

The case came to a hearing in the Court of Appeals, and that court sustained the court below as to the right of the appellant to have a receiver appointed, and to receive the rents, issues and profits of said property in the District of Columbia, as prayed for in said bill; and reversed it on the other points in the case, holding that the appellant Johnson, as assignee of the Ice Company was accountable to the mortgage creditors for the insurance money received by him under the policies taken out by him as assignee, as set out in complainant's bill; and further holding that there should have been an accounting by the appellee, of the proceeds of the property situated in Maine, before a decree of foreclosure could properly be passed. The decree of the court below was reversed, and the cause remanded for further proceedings.

Trust and Banking Co. *vs.* Ice Co., 14 App. D. C. 325.

After the remanding of the case, it was referred to the auditor for the purpose of ascertaining the amount due on the bonds secured by the deed of trust. Additional evidence was taken in the case solely for the purpose of ascertaining the amount of the indebtedness, and the auditor's report was filed in the case on the 21st of March, 1900. No exceptions were filed thereto by appellants, and on the 24th day of the following month, the appellee directed the clerk to calendar the case for the May term of court. Notice of the order was not given to appellants, and they moved to strike the case from the calendar for that reason; this motion the Supreme Court of the District of Columbia declined to grant, and by decree of the 15th day of May, 1900, ratified and confirmed the auditor's report, and passed a decree putting the appellee in possession of the property situate in

this jurisdiction, and enjoining the appellants from interfering with such possession. The amount found to be due on account of the bonded indebtedness secured by said deed of trust was $28,038.50, with interest from the 13th day of March, A. D. 1897. The decree of sale was in the usual form. It was further decreed that in the event the proceeds arising from the sale authorized by said decree be insufficient to pay and discharge, in full, the bonded indebtedness, then, and in such an event, it was decreed to be the duty of the said William G. Johnson, as assignee, as aforesaid, and he was directed to pay unto the trustees in said case appointed to make said sale, the said sum of $3,000 paid by the said insurance companies to him, under a certain stipulation in said cause filed; or so much thereof as might be necessary to pay said deficit; not to exceed, however, the sum of $3,000 (Rec. pp. 121, 122, 123).

From this decree appellants appealed to the Court of Appeals of the District of Columbia, where the decree below was affirmed, with costs, with a modification, however, that the amount of the indebtedness secured by the mortgage be reduced to $26,282.86. As so amended, the cause was remanded to the Supreme Court of the District of Columbia, with directions to carry its decree, so modified, into effect (Rec. p. 32). From this decree, the case was brought by appeal to this court.

---

## BRIEF AND ARGUMENT.

### I.

"The court erred in decreeing the proceeds of the insurance policies to the complainant, trustee."

The question raised by appellant's first assignment of error was finally answered by the judgment of the Court of Appeals of the District of Columbia; and the judgment

of that court thereon can not be reviewed by this court. The amount in dispute is less than $5,000. The amount due upon the bonds secured by the mortgage was agreed upon, and was never at issue between the parties to this litigation (Rec. p. 16). Appellants contended that they were entitled to an accounting of the proceeds derived from the property situated in Maine, before a decree of sale to enforce the mortgage could be properly passed. Such an accounting was had, and the auditor filed his report, which definitely ascertained the net balance of proceeds derived from the sale of the Maine property, properly applicable to the liquidation of the mortgage indebtedness. That report was filed in this case by the auditor; appellants made no exceptions thereto, and it was duly ratified and confirmed. That confirmation settled at once, and forever, the question of the amount due upon the bonds secured by the mortgage, was not reviewed by the Court of Appeals, and can not be opened or considered here. This court, speaking through Chief Justice Waite, in the case of Gray *vs.* Blanchard, said:

> "We hear the case upon the record which is sent up, and if, taking the whole record together, it appears that we have no jurisdiction, the case must be dismissed."
>
> 97 U. S. 564.

The case of Tintsman *vs.* The National Bank is directly in point. In this case the court said:

> "This writ of error was brought by the defendant below to reverse a judgment against him of more than five thousand dollars; but on looking into the record we find that the case was heard on an agreed statement of facts in the nature of a special verdict, in which it appeared that the plaintiff claimed of the defendant eight thousand two hundred and thirty-three dollars and seventy-nine cents, and interest from June 4, 1876. The defendant admitted that he owed of this amount five thousand and ninety-nine dollars and fifty-nine cents, for which the plaintiff

> was entitled to a judgment. The only controversy was as to the liability of the defendant for the difference between what he admitted to be due and what the plaintiff claimed, or three thousand one hundred and thirty-four dollars and twenty cents. This, then, is the amount actually in dispute, and as it is less than five thousand dollars, we have no jurisdiction."
>
> 100 U. S. 6.

Justice Brown, speaking for the court, in the case of New England Mortgage Co. *vs.* Gay, said:

> "It is clear that, while the plaintiff sued to recover $8,500 and interest, he actually recovered $6,800 and interest, and attorney fees, amounting in all to $9,725.66; so that the amount actually in dispute between the parties in this court is the difference between the amount claimed and the amount of the verdict."
>
> 145 U. S. 127.

See, also, in this connection:

> Jennings *vs.* Citizens' National Bank of Rome, 110 U. S. 52.
>
> Wabash, St. Louis, Etc., Rwy. *vs.* Knox, 110 U. S. 304.
>
> Hilton *vs.* Dickinson, 108 U. S. 165.

Assuming, however, that the question raised by this assignment of error can be considered by this court, appellee respectfully submits that the judgment of the court below upon that question was correct, and ought to be affirmed.

The covenant to insure contained in the deed of trust in controversy, is in the following language, to wit:

> "The American Ice Company hereby expressly covenants and agrees . . . to keep said premises and property at all times insured in such insurance companies as may be approved by the trustee in such amounts as shall reasonably protect all the insurable property, payable in case of loss to the

trustee as its interest may appear. In case of loss the insurance money *may be applied by the trustee toward the renewal of, or additions to the property destroyed or injured, or at the option of the trustee the money may either be retained and invested in such securities as it approves, as a sinking fund for the redemption of the bonds when due or be applied to the payment of the principal of such of the aforesaid bonds as may be at the time due and unpaid, and of the interest which may have at that time accrued upon the principal and be unpaid, without discrimination or preference.*"

Then follows a provision not important to be here considered (Rec. p. 27, Art. 7).

That this covenant to insure runs with the land, and is not a mere personal obligation of the covenantor, is a proposition abundantly supported by authority.

In the case of Thomas *vs.* Vonkapff, the facts were substantially as follows: Appellant's testator had loaned to appellee's intestate the sum of $20,000 and took as security for the payment of the same a mortgage on certain lots and improvements in the city of Baltimore. The mortgage contained a covenant providing that the mortgagor and his personal representatives should, during the existence of the mortgage, at his own cost, procure an insurance against loss by fire, to the amount of $19,000. That, in the event of loss the insurance money should be immediately applied to rebuilding and replacing the buildings so injured or destroyed, so that the property should be kept in like order and condition as when the mortgage was given.

Part of the improvements on the property were destroyed by fire. The buildings upon the property at the time of the loss were insured for 10,000, which was paid by the insurance company to the mortgagor. The insurance money was not applied to the restoration of the buildings, and remained on deposit to his credit in the Maryland Savings Institute at the time of his death; subsequently the mortgage was foreclosed and the property sold thereunder, producing a

net sum of $8,225.69. The estate of decedent was insolvent, and his personal representatives contended that the insurance money belonged to the estate, to be applied in satisfaction of the claims of the general creditors. In the course of its opinion, the court said:

> "That this is a covenant running with the land, can, we think, scarcely be doubted. The covenants to repair and rebuild are undoubtedly so, and what is this, in effect, but a modified covenant to repair and rebuild? The insurance is to be kept up so that in case of loss by fire the sum insured shall be immediately applied in rebuilding the property on the premises. Being of this character it would run with the land, just as would an absolute covenant to repair or rebuild; and running with the land, the record of the mortgage would be notice to all the general creditors, and they would have no just pretensions to participate in the fund, to the prejudice of the particular creditors."
>
> 6 G. & J. 251.

In the case of Vernon *vs.* Smith, the question was as to whether the covenant to insure runs with the land so as to bind the assignee. The court held that by virtue of the Statute of 14 George III, Ch. 78, the owner had the right to have the insurance money applied to rebuild the property destroyed by fire, and that the covenant to insure was therefore, in effect, a covenant to rebuild or repair at the election of the covenantee, and for that reason ran with the land.

5 Barn. and Ald. 10.

The duty created by the statute, and by the act of the parties, is no more obligatory upon them than is such an obligation arising from their express covenant.

The case of "*In re* Sands Ale Brewing Co." has many features in common with the one at bar. The brewing company borrowed certain sums of money, and gave a mortgage

on its property to secure the payment of the same. The mortgage contained a covenant that the insurance policy should be assigned to the mortgagee. That in the event the mortgaged premises should be injured or destroyed by fire, the mortgagee should have the right to collect the insurance money and apply the same in his discretion, either in the discharge of the indebtedness secured by the mortgage, or in repairing or rebuilding the buildings injured or destroyed. The insurance was made and assigned as required by the terms of the covenant in the mortgage. When the policy expired a new policy was taken out and not assigned. The buildings having been destroyed by fire, the assignee in bankruptcy had collected a part of the insurance money. This was a petition on the part of the trustee under the mortgage to have the money so collected paid to him in satisfaction of the mortgage debt. In the course of its opinion the court said:

> "The assignee in this case can hold nothing that the grantor in the trust deed could not have held, if bankruptcy had not intervened. His relation is purely representative. Creditors who have trusted the bankrupt must be held to have done so with full notice of the covenant to insure, and of the legal and equitable effect of that covenant. The covenant to insure runs with the land, as much as a covenant to repair and rebuild or for another term."
>
> 3d Bis. Rep. 175.

That a covenant to rebuild buildings destroyed or injured by fire, which were upon the property at the time of the covenant, is a covenant running with the land, was settled in Spencer's Case, 1st Smith Ld. Cas. 116.

A covenant to rebuild or repair at the election of the covenantee is as much within the principle established in this case, as though the obligation were absolute instead of elective. If the covenant in controversy was merely a covenant to insure without more, it might be questionable whether it

run with the land or was a mere personal obligation binding the covenantor alone.

Dunlop *vs.* Avery, 89 N. Y. 596.
Reid *vs.* McCrum, 91 N. Y. 412.

In neither of these New York cases was the question here presented before the court. In neither of them was there any provision permitting or requiring the insurance money to be applied to the restoration of the buildings insured in the event of their destruction or injury, and in the latter case the court expressly declared that it had no purpose of deciding what would be the effect of such a covenant.

In the case of Dunlop *vs.* Avery, the contest was between a senior and a junior mortgagee, as to which had priority to the proceeds arising from an insurance upon the mortgaged property. Both mortgages contained a covenant on the part of the mortgagor to insure for the benefit of the mortgagee. The first mortgage was recorded before the second was made. When the second mortgage was made, the policy of insurance was taken out, and the loss made payable as interest might appear, to the mortgagee. This insurance was kept up, until the property insured was destroyed by fire; at which date the policy of insurance previously taken out for the benefit of the first mortgage had lapsed. The second mortgagee had no actual notice or knowledge of the existence of the first mortgage, and only such notice thereof as was imported by the record of the first mortgage. Under these circumstances, the question arose whether the first mortgagee had such an equitable right to the money arising from the policy, as entitled him to priority over the party to whom the loss was made payable. In the course of its opinion the court said:

> "There is no doubt as to the correctness of the rule that when the mortgagor is bound by the terms of the mortgage, to keep the premises insured for the security of the mortgagee, that, *as between him and*

*the mortgagor*, an equitable lien arises in favor of the mortgagee, for the money received on the insurance, to the extent of the mortgage.

The deed of trust before the court was duly recorded among the land records of the District of Columbia. Such record constitutes legal notice of the contents of the instrument to all persons dealing with the title, and the covenant in question would bind even a purchaser for value. The exigency of the case does not require the court to go so far. The assignee of the American Ice Company is not a purchaser for value. He is a mere volunteer.

The assignee under an assignment for the benefit of creditors is the representative of the assignor and not the representative of the creditors, and can not, therefore, take to himself any of their rights. He is not a purchaser for value. The property covered by the assignment is subject to all the equities and liens which exist against it in the hands of the assignor. He succeeds to and enjoys the rights of the assignor, and none other, except that the property in his hands is not liable to execution. He is but the assignor himself so far as the rights of the creditors are concerned.

Burrell on Assignments, 391, and cases cited.

In the case of Chipman *vs.* Carroll the court held that where there is an agreement between the mortgagor and the mortgagee that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and the mortgagor takes out a policy of insurance in his own name which is not assigned to the mortgagee or made payable to him in any way, the mortgagee has an equitable lien upon the proceeds of the policy, and that this agreement might be shown by parol evidence. The clause in the mortgage referring to insurance in this case was in the following language:

"But if default be made in such payment, or any

part thereof, or the interest thereon, or the taxes, or if the insurance is not kept up thereon, then this conveyance shall become absolute."

25 L. R. A. 305.

The covenant on the part of the American Ice Company to keep the premises insured for the benefit of the bondholders gave to the trustee under the deed of trust an equitable right to a lien upon the policy when taken out and upon the insurance money in case of the loss or destruction of the property insured. This right is not affected by the failure of the covenantor to have the policy made payable to the trustee, as was required by its terms, nor could it have been defeated even by an assignment of the policy for the benefit of other creditors. It is a right binding not only the grantor in the trust, but its assignee in bankruptcy, and even a purchaser for value with notice.

In Thomas *vs.* Vonkapff, supra, the court said:

> "The mortgagee had undoubted right to the fund thus arising (that is from the insurance) which could not be overreached by Thomas or his creditors, and if the property was clothed with a trust, his legal representatives would also take it clothed with the same trust. The mortgagee, as between himself and the mortgagor, had, in virtue of the covenant to keep up the insurance, a qualified lien on the amount of insurance, that is he had a right which attached itself to the fund, not a right to be sure which would divest the mortgagor of his possession, but a right which would cling to the fund until it was expended for his benefit, to the extent of his lien under the mortgage. The mortgagor in his lifetime could never have diverted the fund from its destined object; it would pass to his administrators clogged with the same equitable lien with which it was encumbered in the mortgagor's lifetime. The particular creditor and the general creditor stand in different attitudes. The former never trusted to the personal credit of the mortgagor, but trusted and looked to this par-

> ticular fund to satisfy his debt, or give him security for it; the general creditors trusted to a personal credit alone."

The doctrine here announced was followed in Geddings *vs.* Seevers, 24 Md. 372.

So in *In re* Sands Ale Brewing Co., *supra*:

> "The assignee could hold nothing in this case, which the grantor in the trust deed could not have held, if bankruptcy had not intervened. The creditors who have trusted the bankrupt, must be held to have done so with full notice of the covenant to insure, and of the legal and equitable effect of that covenant."

Continuing the court said:

> "My conclusion then is that the covenant of the bankrupt to insure operated to assign in equity to the petitioner, the benefit of any insurance effected by the bankrupt on the mortgaged property. It is no answer to say that the mortgagee might have insured in default of insurance by the mortgagor, because the mortgagor *had* insured, and his insurance inured at once to the benefit of the mortgagee. Equity made the assignment the moment the insurance was effected, if the mortgagor did not."

In the case of Miller *vs.* Aldrich, the facts were substantially as follows:

Miller became surety for one Chapman on a note of $300. To secure complainant Chapman gave a mortgage on a certain dwelling house and agreed to take out a policy of insurance for the benefit of Miller. The insurance was effected in accordance with the stipulation. Chapman subsequently sold the mortgaged premises to the defendant Aldrich, subject to the mortgage, with an oral understanding that Aldrich should keep the house insured for the benefit of complainant. The old policy was surrendered and a new one taken out in the name of Aldrich, without providing for the

protection of complainant. The building was thereafter destroyed by fire. Aldrich declined to apply the insurance money in accordance with the oral stipulation. Miller filed a bill in equity to enjoin the company from paying the money to him, and to establish a lien upon it in favor of complainant. In deciding the case Chief Justice Graves said:

> "Chapman had bound himself to afford the mortgagee security supplementary to and connected with the mortgage. The mode agreed upon had reference to the mortgaged buildings, and was to be of the nature to keep the mortgaged property itself so far intact as a means of security as to perpetuate the safety of the mortgagee's interest in case the buildings should burn. This stipulation was, in equity, a sort of adjunct to the mortgage, and was binding on Chapman and all others in his shoes with notice."
>
> 31 Mich. 411.

The evidence in the case did not show whether the mortgage itself contained any provision as to insurance or not but the case was decided upon the theory that it was immaterial whether the contract to insure was contained in the mortgage or rested in parol.

In the case of Cromwell *vs.* Brooklyn Fire Insurance Company, the facts so far as material to the point under discussion, were as follows: C held a written contract for the purchase from B of a lot, and under this contract took possession. In pursuance of a parol agreement C built a house upon the lot, and sold it so improved to E, and delivered possession to him. The agreement provided that E should pay the taxes and interest, and keep the house insured for the benefit of C. He did at first procure an insurance in his name, which was payable to the vendor. The policy having expired, E took out another one in his own name. C assigned his contract of sale to complainant. The house was destroyed by fire. Complainant notified the de-

fendant company of his lien upon the policy. Notwithstanding this, the defendants paid the amount due upon the policy to E. This was a suit against the company to establish a lien upon the fund. The court held complainant entitled to the relief sought, and said:

> "In the absence of any proof to the contrary, it must be inferred that he (E) made the insurance in pursuance of his agreement, and for the benefit of his vendor, and such, undoubtedly would have been the legal inference, no matter what may have been his secret intention when he effected the insurance."
> 44 N. Y. 46.

E in this case, had no contract relation with the complainant, and was under no obligation to him other than that which arose from his possession of the property to which complainant had an equitable title.

The doctrine announced in these cases is sustained by numerous authorities:

Nichols *vs.* Baxter, 5 R. I. 491.

Ellis *vs.* Crutzinger, 27 Mo. 311.

Lazarus *vs.* Commonwealth Ins. Co., 2 Amer. Ld. Cas. 834.

Grange Mill Co. *vs.* Western Assurance Co., 118 Ill. 396.

Masury *vs.* Southworth, 9 Ohio St. 348.

Chipman *vs.* Carroll, 25 L. R. A. 305.

The case of Willis *vs.* Eastern Trust and Banking Company, 169 U. S. 295, decided merely that the defendant in error had mistaken its remedy; that the relation of mortgagor and mortgagee was not that of landlord and tenant; that the statutory remedy afforded a landlord in this jurisdiction for obtaining possession of rented property where the tenant is in default, is not available to the mortgagee to obtain possession of the mortgaged premises, where the mortgagor is in default. The right of the trustee to take

immediate possession of the property covered by the trust, for the purposes of sale, was secured in express terms by a clause in the deed of trust (Rec. p. 25, Art. 2). The proper remedy was ejectment, not the landlord and tenant proceeding invoked by the trustee.

After default and demand made upon appellants for possession, their holding was tortious, and in violation of the express terms of the trust (Rec. pp. 15, 16).

The case of Cushing *vs.* Thompson, 34 Maine, 496, cited by appellants, was a bill to redeem. The mortgagor's interest had been sold under an execution against it. He remained in possession of the property after sale, and within the time allowed by the local law, within which right of redemption was reserved, filed his bill. The purchaser insured the buildings upon the property, and these were destroyed by fire before the suit was brought. The redemptioner claimed the right to have this insurance money applied to the liquidation of the debt for which the property was sold. In the course of its opinion the court said:

> "The interest insured was that of the defendant, alone. It was not apparent that the complainant paid any part of the premium, had any connection with the insurance, or knew of its existence, till the loss of the property. The defendant could not have compelled payment from the defendant of the premium, or any part of it."

The portion of the opinion quoted in appellants' brief states the general principle of interpretation applicable to a contract of insurance. The facts in the case did not involve the determination of the question under discussion, and is without bearing upon that question.

It is conceded that a contract to insure is, in general, a personal contract. If the insurance is upon improvements to land, it has, in the absence of express contract, no relation to the title of the land; but it is entirely competent

for parties, by express contract, to enlarge the scope of insurance contracts, and to bring them into relation to the title of the property insured. That is precisely what is done by the provisions relating to insurance in the deed of trust under consideration.

Chief Justice Alvey, in discussing this branch of the case, said:

> "The object of the covenant in this case is plain enough, and so the terms in which it is expressed. The American Ice Company expressly covenants to keep the property *at all times insured*, in such amounts as shall *reasonably protect* all the insurable property, payable, in case of loss, to the trustee, as its interest should appear; and in case of loss the insurance money might be applied by the *trustee toward the renewal of or addition to the property destroyed or injured*, or it might be, at the option of the trustee, placed in a sinking fund for the redemption of the bonds.
>
> "It is very clear that by the terms of the covenant it had relation to the land, and its principal object was to keep and maintain the buildings on the property in condition for carrying on the ice business. This was the great object of the insurance required, as means of security to the bondholders. Without this the property, by fire, might be rendered of little value, and the bondholders be left without security. By means of the insurance it was intended that the property should be maintained as security; and hence it was provided, primarily, that the insurance money might be expended in renewal of or adding to the buildings. In such case, it has been repeatedly held that the covenant does run with the land, at least in an equitable sense; and where an insurance has been obtained, though by an assignee, and a fire has occurred, and the insurance money has been received, a court of equity has held that the insurance money should be applied for the benefit of those for whose protection the original covenant was made."
>
> Trust and Banking Co. *vs.* Ice Co., 14 App. D. C. 331–332.

In the case of Wheeler vs. Insurance Co., it appears that one John H. Green, a planter, was indebted for advances made to him by a firm of the name of Johnson & Goodrich. To better secure them for such advances, he authorized the firm to place an insurance upon his buildings, gin house and other property. They took out two policies of insurance in their own names, on the property of their debtor, who subsequently became insolvent. The property was destroyed by fire, and the firm claimed the insurance money; but before it was paid to them, plaintiff filed suit against the Insurance company, for the purpose of intercepting the insurance money, claiming that he had a right thereto, as the assignee of three mortgages put upon the property by Green, prior to the date of the insurance. The last two of these mortgages contained a covenant on the part of Green, the mortgagor, to insure for the better security of the mortgagees. Johnson & Goodrich had no actual notice of these mortgages. There was more than sufficient money to discharge their claim, in full. The court held that they were entitled to sufficient of the insurance money to liquidate the indebtedness due from Green; but that the surplus equitably belonged to the plaintiff; and cited in support of this decision, the case of Thomas' Admrs. vs. Vonkapff's Exrs., supra, and a number of other cases cited in this brief.

Had this insurance been effected by the Ice Company, there could be no question as to the right of the appellee to intercept the insurance money, and apply it, so far as necessary, in the discharge of the bonded debt. Has the assignee of the grantor in the deed of trust, a better right to the insurance money?

101 U. S. 439.

The court below, in discussing this phase of the case, said:

> "It is certainly true that Johnson does not occupy the position of a bona fide purchaser without notice. He is in the shoes of the Ice Company, and can occupy no better position than the assignor itself, with

respect to the property assigned. His relation to the assignor is of a representative nature. By taking the assignment for the benefit of all the creditors, he did not extinguish or modify the covenant to insure, nor did he relieve the property of the charge to sustain, at all times, the insurance on the property for the protection and as an additional security of the bonds held under the mortgage. The insurance was a part, and a very important part of the scheme of security for the redemption of the bonds; and as such it should not be impaired or avoided by placing the property in the hands of an assignee. The property itself was charged with the obligation of maintaining the insurance, and Johnson, taking the property in his representative capacity, and placing himself in the position of his assignor, took the property *cum onere*. Having assets of his assignor sufficient to pay the premiums for the insurance required by the covenant, a court of equity would compel him to effect and maintain the insurance as required by the covenant. This principle is well illustrated by the case of Holmes *vs.* Buckley, Equity Cases Abridged, 26."

Trust and Banking Co. *vs.* Ice Co., 14 App. D. C. 330.

The American Ice Company had no insurable interest in the mortgaged property after the assignment. It was thereafter in no position to fulfill its covenant to keep the mortgaged premises insured for the benefit of the trust. After the assignment this obligation devolved upon the assignee. He was in possession, in pernancy of the rents and profits at the time of the fire, which occurred long after default in the mortgage, and after due demand had been made upon him for possession of the property by the trustees, as provided by the deed of trust, in subordination to which he took title. The litigation which followed demand for possession was rendered necessary by the failure of the assignee to yield possession to the trustee under said trust. Retention of possession by the assignee, and the resulting litigation, rendered it difficult, if not impossible, for the trustee under

the deed of trust to obtain any insurance upon the property.

The assignee collected the rents accruing from the property for more than two years after the American Ice Company made default in the payment of its bonds, and after demand was made upon him for possession. Out of these rents, he kept the property insured, and when it was destroyed by fire, proposes to keep the balance of the rents and the money derived from the insurance.

It is respectfully submitted, first, that the covenant relating to insurance, contained in the deed of trust, is one which runs with the land; second, that the claim of the trustee to the insurance fund is equitably superior to the claim of the general creditors, and ought to prevail in this case.

II.

"The Court erred in not remanding the case to the court below for further proceedings."

In the predicament in which this case was when it was heard in the Supreme Court of the District of Columbia, it was not necessary that it be placed on the calendar at all.

The only question remaining open was as to the amount due on the bonds secured by the deed of trust; all the other questions in the case were settled by the decision of this court in the case of Trust and Banking Co. *vs.* American Ice Co., *supra*. The amount due upon the bonds were ascertained by the auditor's report, and no objections having been filed to that report, within the time allowed by law for making such objections, it was absolutely conclusive upon the parties; it could not be questioned in the court below, and can not be questioned here. The appellee was entitled to a confirmation of that report, without notice to the appellants.

Equity Rule No. 86, of the Supreme Court of the District of Columbia, is in the following language, to wit:

> "The auditor, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk on the docket. The parties shall have one month from the time of filing the report to file exceptions thereto, and if no exceptions are within that period filed by either party the report may be confirmed. If exceptions are filed they shall stand for hearing before the court at the next sitting thereof."

The confirmation of the report carried with it the right to a final decree. Equity Rule 64 of that court, is in the following language:

> "No cause in equity shall be set down for hearing unless the same be at issue and ready for hearing, or be properly set down for hearing, on bill and answer, or bill and answer and replication; and every such cause may be ordered by either party or his counsel to be placed upon the calendar, provided such order be given at least five days previous to the first day of the next term. Any case once properly set down for hearing and placed upon the calendar, if not disposed of by the court, shall remain upon the calendar in its proper order, unless otherwise directed by the court."

This rule relates to the setting of cases for hearing on bill, answer and replication; it has no application to a case which has once been heard and determined, and comes back for some further action. The rule never contemplated that it should be necessary to place the same case twice on the calendar, but when once properly calendared, must be considered as remaining upon the calendar until finally heard and determined.

The order referring the case to the auditor was, as suggested in the argument of this assignment, limited in scope, but it was as broad as was require by the condition of the case, and was in exact conformity to the judgment of the Court of Appeals in the case of Trust and Banking Com-

pany *vs.* Ice Company, *supra*. The following quotation is from the opinion in that case:

> "The question of the distribution and application of the proceeds of sale may affect, under the terms of the deed of trust, the American Ice Company and its general creditors, claiming under the general assignment to Johnson. Hence they have a right to a strict account of the proceeds of sale of the property in Maine. As to what allowances for disbursements, expenses, commissions, etc., are proper, will be for the court here to decide, in order to make proper distribution of the proceeds of sale of the property in this jurisdiction. That such exhibits should be made, and a proper account stated as preliminary to the decree of sale of the property here, we think is proper and necessary. Until this account is stated, it can not be determined with certainty for what amount the decree for foreclosure and sale should be passed, or what amount of indebtedness is still due."

Had the appellants desired a different order of reference to the auditor, they should have made application for such order to the court that made the reference. Failing that, it is too late to suggest such an objection for the first time, in an appellee court. Appellants were not injured by the calendaring of the case without notice. The case was regularly on the assignment, and called for a hearing on May 19th, in the Supreme Court of the District of Columbia, sitting as an equity court. Appellants were allowed until May 14th in which to prepare for argument and hearing, at which time the motion to strike from the calendar was filed. The rule of the Supreme Court of the District of Columbia requiring equity cases to be calendared and notice to be given to the opposing party five days before the next term of court, exclusive of Sundays, was for the purpose of affording time to the clerk of the court to make up the calendar, and for the party to whom notice was given to make objec-

tions to a case being calendared, because it was not ready for hearing under the terms of the rule.

Appellants knew that the auditor had completed his audit; that his report had been filed, and that of itself conveyed implied notice to them that the taking of evidence on the part of appellee was concluded. Yet, during all that time, appellants expressed no desire to take testimony in the case. The long time consumed in taking the additional testimony, which was taken after the decision in the Trust and Banking Company *vs.* Ice Company, was largely owing to the difficulty experienced in obtaining the attendance of appellants at the hearing before the auditor. Whether counsel for appellants argued his motion to strike the case from the calendar in the Supreme Court of the District of Columbia is a question of no importance, as he was present when the decree was passed overruling the motion and directing the sale, and suggested the name of one of the trustees who were to make the sale. His motion to strike from the calendar, because he had no notice of the calendaring of the case, was only one of the subject-matters of said motion. The motion also opposed any sale being made because of the pendency of the Potomac Flats Case, which appellants contended had not been decided, within the meaning of the opinion of the Court of Appeals in this case; and that appellants should be entitled to compensation for services rendered, and moneys expended in the prosecution of that suit, and that they should be allowed to take evidence in that behalf before a sale could be properly made. The filing of such motion amounted to a general appearance, and would have given a court having jurisdiction of the subject-matter, authority to hear and determine the case.

The cases touching this point, found in appellants' brief, have no application to the point under discussion. Each of these cases relate to the obtention of jurisdiction of the person of the defendant, at the inception of the cause, and have no application to a case where the parties are already before

the court by subpœna and answer. When jurisdiction of the defendant has once been properly obtained, any irregularity in the proceedings, touching the service of notice, can in no wise affect the jurisdiction of the court. Such irregularity may furnish ground of appeal, but can in no wise vitiate the validity of a decree or judgment. In each of the cases cited, the question of jurisdiction was raised by special motion for that purpose, or by demurrer; and this court held that the overruling of the motion or demurrer, still preserved the question of jurisdiction in the record. In this case, appellants coupled their motion to strike from the calendar, with an application for the extension of time to take testimony, and an objection to a decree for sale. This, of itself, amounted to a general appearance in the case, such as would have given the court, at the initial stages of the case, jurisdiction of the persons of the appellants.

Commenting on this assignment of error, the court below said;

> "They [the appellants] had their day in court, and they were not prejudiced by any failure of notice to appear. And so far as this assignment of error has reference to supposed imperfections in the audit, or in the scope of the reference to the auditor, it would have been easy to cure them, either by exceptions to the auditor's report, or by testimony before the auditor, or by application to the court to enlarge the scope of the reference, no one of which was sought to be done. It is too late for the appellants to complain in this court of that which was their own failure in the court below. We find no merit in this first assignment of error."

It is respectfully submitted that this assignment of error is without merit.

III.

"The court erred in decreeing a sale pending the litigation in the Potomac Flats Case."

Much of appellants argument under their third assignment of error appears to be devoted to a vindication of the course pursued by the appellant assignee, in his conduct in relation to the Potomac Flats Case, from the seeming aspersions cast thereon by the Court of Appeals. As this seems to be a controversy as to propriety of conduct, waged between the appellant assignee and the court below, the writer of this brief will abstain from making any comments thereon, and will leave the parties mostly interested to settle their difficulties in such mode as may seem to them advisable.

The Court of Appeals of the District of Columbia rendered a decision on the first appeal in this case, on February 28, 1899. At that time, the case of Morris *vs.* United States, commonly known as the Potomac Flats Case, involving the title of the land comprising the bed of the Potomac River, was pending in this court. In reversing the decree of the court below for the sale of the property, the Court of Appeals directed that no sale of said property should be made until the Potomac Flats Case had been decided. For, said the court—

> "otherwise the sale of the property made subject to the final decree of that case, could not be otherwise than a mere speculation, and would most certainly result in obtaining nothing more than a nominal sum" (14 App. D. C. 337).

The Potomac Flats Case was decided May 1, 1899. The title of the bed of the Potomac River was adjudged to be in the United States. But the court further held that the claimants were entitled "to the value of their respective rights, titles and interests, ascertained and awarded to them"

(174 U. S. 291.) And it referred to the following cases on the method to be pursued in ascertaining such value.

Monongahela Nav. Co. *vs.* United States, 148 U. S. 312.

Hazel *vs.* B. & O. RR. Co., 169 U. S. 22.

There are only two possible elements of value that can be claimed by the parties interested in said property. One is the value of the improvements; the other, the income derived from the property, or what might be reasonably derived therefrom. The element of uncertainty of value arising from the condition of the title of the property has been removed by the decree in the Potomac Flats Case. How is the value of the rights of the claimants to be ascertained? Clearly by evidence showing the income derived from the property, or which might be obtained therefrom, by proper management, by ascertaining from persons competent to judge, the value of the wharves and other improvements. Such information is equally available to any person who desires to deal with the property, as it is to the courts, in a formal judicial investigation. The value of such interests is no more indefinite or uncertain, than is the value of property that is constantly being sold by judicial process. The property in controversy is now in possession of the purchaser, under the decree of the court, as hereinbefore stated. The Government has not attempted to take possession of the property, nor has it taken any evidence to ascertain its value. For nearly a year last past, the Attorney General has caused surveys to be made of the riparian properties involved in the Potomac Flats litigation, and has taken some steps looking to the ascertainment of the claims of private persons to the wharf property along the river front; but no evidence has been offered by anybody looking to the ascertainment of the value of the property in suit. As was said by Justice Morris, speaking for the court below, discussing this branch of the case:

"All the parties seem to be willing to permit the matter to rest indefinitely and until some emergency arises to demand energetic action, which may possibly be in the remote future.

"The American Ice Company, one of the appellants in this case, was a party to the Potomac Flats Case, and participated in the conduct of that litigation until the final decision by the Supreme Court. The Eastern Trust and Banking Company, the appellee here, was not a party to that suit; and it is argued here, on behalf of the appellants that it could not now be permitted to intervene in it in any manner. And the argument is further, that until the rights of the American Ice Company shall have been determined in the Potomac Flats Case, or in other words, until the American Ice Company thinks proper to move in the Potomac Flats Case for a valuation of its interest, which, of course, it may postpone forever, if it chooses, there can be no sale of that interest, and no decree should be rendered for such a sale. But the very statement of such a proposition as this is sufficient to discredit it. Were we to adopt it as the law of this case as now developed, it would simply be an invitation to the American Ice Company to take advantage of its own inactivity in order to perpetrate a wrong on the appellee. What the valuation of its interest in the premises would prove to be, if actively pressed to a determination, we can not, of course, anticipate; but it may be questioned, from the record of this litigation, whether it would be sufficient to satisfy the claims of the appellee and its other creditors. The American Ice Company therefore, has probably no motive of self interest to move for the ascertainment of the value of its interest in the property in controversy; and it does not seem to be eager to admit the appellee to a share of the work of inquiry into that matter. It seems never to have called upon it for assistance, or requested it to contribute to the expense; and yet one of the grounds of complaint here on the part of the appellants is that the appellee has not contributed to the cost of litigation."

Ice Co. *vs.* Banking Co., 17 App. D. C. 428.

The Court of Appeals furnishes its own commentary upon what it meant by staying the sale of the property until after the decision in the Potomac Flats Case; and its negative upon the construction put by appellants upon such direction, is a sufficient answer to appellant's contention.

## IV.

"The court erred in not requiring the complainant trustee to make contribution to the costs of the litigation in the case of the United States *vs.* Morris, known as the Potomac Flats Case, and in not remanding the case to the Supreme Court of the District, for that purpose."

In this assignment of error the appellants make the extraordinary suggestion that they are to be paid by the bondholders for professional services rendered and for money expended in the Potomac Flats litigation, and argue that, as they were under no obligation to defend the suit for the benefit of the bondholders, and because they will be benefited by the result obtained in that litigation, the appellee should bear a portion of the expense attending that litigation. There is no pretense that the appellee authorized any expenditure of money in the defense of that case; on the contrary, when requested, it expressly declined to authorize the appellant assignee to represent the appellee in that litigation, or to expend any money therefor. It was a trustee for, not the owner of the property. It had no power, even if it had desired, to have entered into contract with appellants respecting the litigation in question. It was not necessary to protect the interests of the bondholders under the trust.

Precisely the same result would have been reached, so far as appellee is concerned, had appellants not expended the money and performed the labor which they suggest have been expended and performed in the premises. There

were many other parties engaged in the same litigation, and numerous other counsel engaged in the same cause, who filed briefs, and orally argued the case in both courts. The appellant, William G. Johnson, as assignee of the American Ice Company, has in his possession, as such assignee, all the funds obtained from a sale of the property belonging to said company except such as is embraced in this deed of trust, or upon which there were specific liens, together with a large amount of rent collected from a part of the property described in said deed of trust, situate in this city. Appellants were not going to war at their own charges. This fund will be liable to the holders of the bonds secured by the deed of trust, in suit, after the appellee has exhausted its remedy upon the property embraced in the deed of trust, and it will be entitled to participate with the unsecured creditors ratably in the distribution of that fund. It was for appellants' interest, therefore, to make the defense in the Potomac Flats Case, if any was to be made; and whether any ought to have been made or not, was committed to the honest discretion of the assignee; but how he can make himself, either in the character of assignee, or as attorney or counsellor at law, the creditor of the appellee, not only without its consent, but against its express notification and protest, is a little difficult to understand. A proper interpretation of the deed of trust before the court makes it the duty of the American Ice Company to defend the title to the property embraced in the trust, if such defense should become necessary. The limiting clause in the deed purports to convey a fee simple title in and to the property embraced in the trust, and article 9 of the trust contains a covenant whereby the grantor therein agrees from time to time, during the existence of said trust, to make, execute, acknowledge and deliver all such further instruments and conveyances as, in the opinion of counsel, may be necessary to facilitate the execution of said trust, or further to secure the *rights and remedies* of the holders of

said bonds (Rec. pp. 24, 25 and 28). This is equivalent to a representation on the part of the grantor and its successors and assigns that they had a fee simple title to said property, and certainly it would estop said grantor from ever after asserting claim against said trustee under said deed of trust, to any after acquired interest or right therein, whether acquired by conveyance or as the result of litigation.

Van Rensselaer *vs.* Kearney, 11 How. 297.

The betterments upon the property in controversy were upon the property at the time the bondholders advanced their money upon the security afforded by the deed of trust. No improvements have been made upon the land since; on the contrary, such improvements as were there have been rendered nearly valueless by fire. The title to the land covered by the wharf and improvements has failed, and appellants' argument is that the appellee shall not have the benefit of the improvements. Just why the value of the improvements should not inure to the benefit of the parties secured by the trust is not apparent, unless the court is to apply the scriptural principle that "from him that hath not, shall be taken away even that which he hath."

V.

"The Court erred in not dismissing the bill, because of the inequitable abuse of its trust by the trustee."

Appellants state under this assignment of error, that the sale made by the appellee in Maine, in September, 1894, was—

> "a mere ruse, by an apparent formal execution of the trust, to extinguish the equity of redemption of the mortgagor, and substitute, for the public sale, by the trustees, the private sale conducted solely by three bondholders, the trustees servilely obeying their directions in all things."

This is a serious imputation, and ought not to have found a place in appellants' brief unless warranted by the facts as established by the evidence. Appellants do not controvert, but admit that due notice was given, as required by the power of sale contained in the trust, of the three offerings made of the property, in the city of Bangor, State of Maine. Mr. John Miller, a witness on behalf of the appellee, and holding $9,800 of the bonds secured by the trust, says, in substance, that he attended the sale in Bangor in May, 1894; that there were twenty-five or thirty persons present at the sale; that the offering was made by an auctioneer and a representative of the assignee; that there was no bid at that time of over $10,000, and the property was withdrawn; that the reason the property was not sold at that time was because it did not bring what it was worth. It was then postponed for one mouth, notice of the time and place being given at that time; that he attended the June offering; that no sufficient offering was made and the sale was again postponed to September; that there were present thirty or more persons at the last sale, and about a dozen bids were made; that the next best offer to that of the committee of the bondholders, was $13,000 or $13,500; that this was made by the Knickerbocker Ice Company, of Philadelphia; and that he, with the other members of the bondholders' committee, bid in the property for $14,000. In response to the interrogatory as to what effort was made at the time to make the sale, he said:

> "Well, we notified all the different ice companies all over the country that we thought might be likely to buy the property; people that would buy the property in New York and people that sell the ice in the city of Philadelphia and the people here in Washington."

Notice was given by the papers, through the mails and by personal notice (Rec. pp. 62, 63, 64 and 65).

After the property was struck down in this way to the

committee representing the bondholders it was held by the trustee and rented by it for a period of about two years, when the property was sold and the title transferred to the purchasers, who were the Consolidated Ice Companies of New York, for the sum of $16,500. The trustee, who held the legal title, and the committee representing the bondholders, who had the equitable title to the property, united in the deed to make title. The sale to the Consolidated Ice Companies was made by the committee of the bondholders (Rec. p. 81). The purchase money for the property was paid at the date of the last sale (Rec. p. 84).

During the period intervening between the date of the auction sale, September 8, 1894, and the sale to the Consolidated Ice Companies in March, 1897, the sum of $4,800 had been received by the Trust Company, as agent for the bondholders, for the rent of the property (Rec. p. 87). This is all the evidence found in the record touching the regularity of the sale, which the appellants designate as "pretended," and "a ruse." No motive is or can be suggested for the bondholders desiring to sell for less than the best price obtainable for the property, and it may be confidently assumed that such price was obtained.

It is respectfully submitted that these appellations are not warranted by the proof. The price at which the property sold at the last offering, at auction, was insufficient to discharge the bonded indebtedness. Had the purchase price been then paid in cash, by the purchasers, the bondholders would have been obliged to assess themselves in order to have made such payment to the trustee, and then they would have been entitled to have received the proceeds from the sale, back again, in the shape of a partial payment, less the expenses attending the execution of the trust; or they would have been entitled to pay the expenses of the sale, in cash, and, after having the net balance credited on their bonds, to have taken the immediate title to the property. Instead of doing this, they allowed the title of the property to remain

as it was until they succeeded in finding a purchaser therefor, at private sale; and then directed the trustee to make the deed, instead of directly to them, to the purchaser from them. No person was injured by this method of dealing with the property; on the contrary, the general creditors, who are the only persons for whom appellants have manifested any solicitude, were benefited. The bondholders, instead of making distribution upon the bonds, in accordance with their rights, under the sale at auction, of the 8th of September, 1894, settled with the bondholders on the basis of the private sale, and of the rents derived from the property between the dates of the two sales. This statement was entirely correct as to them, but it was incorrect as to the general creditors. All that they were entitled to, as against the general creditors, was a settlement on the basis of the sale of the property at public auction. The auditor took a different view of the subject, and stated his account on the basis of the sale of 1897 (Rec. p. 112). The auditor does not find that the sale of the property situated in Maine, which took place in September, 1894, was a mere formality. On the contrary, he does not attempt to pass on the validity of that sale (Rec. pp. 109–10–11–12). By so doing he would have overruled the judgment of the court which referred the case to him for audit, and of the Court of Appeals.

The regularity and validity of the sale was upheld, not only by Justice Cox, before whom the case was first heard, but also by the Court of Appeals in the case of the Trust and Banking Co. *vs.* Ice Co., 14 App. D. C., in which the court, speaking on this point, said:

> "There is no fraud charged, and no such irregularities shown, as furnish the foundation for impeaching the fairness and good faith of the sale that was ultimately made. The deed of trust was made in Maine, and the sale of the property situated in that State, was made there; and we must suppose, in the absence of any affirmative evidence to the contrary, that the sale was legally and fairly made. Both the

> law of the contract, and of the situs of the property sold, was that of Maine; and it does not appear that the sale has ever been questioned in that jurisdiction. We must therefore assume that the sale was validly made, according to the law and practice of that State" (p. 336).

The same question came before that court at the last hearing; and, in discussing this assignment of error, the court said:

> "The fifth and last assignment is that the bill of complaint should have been dismissed. It is not usual to consider a general assignment of this kind without some specification. It is true that there is in the brief for the appellants a suggestion in this connection that, in view of the sale or sales which had been made of property in Maine, the appellee should not now be permitted to have recourse to the property in this District. But, as the defendants have been given the benefit of all the sales in Maine and credited with the highest amount realized, and as that amount falls far short of discharging the indebtedness, it is not apparent why the mortgagee should be debarred from recourse to the other property covered by the mortgage. But this point does not seem to be seriously insisted on here by the appellants, and the assignment of error is no more than a merely formal assignment."
>
> Ice Co. vs. Banking Co., 17 App. D. C., 430.

The writer of appellants' brief urges that, as a punishment for the violation of its trust by the trustee, the bondholders secured by the trust have no right to enforce it, or to have it enforced in their interest. No citation of authority is made in support of this proposition, but it appears to be a mental conception of appellants' counsel alone. That a trust once validly imposed upon a property, should be invalidated, and the purposes of the trust defeated by the misconduct of the trustee, is a proposition new to the doctrine of trusts. The property has now passed into the hands

of an innocent holder for value, and it is probably too late for any irregularity in the sale, if any such there were, to be drawn in question. Certainly, this court must treat said sale as valid, unless it were absolutely void upon its face. It has no right to treat the sale as a nullity, on the ground of a mere irregularity.

The mandate of the Court of Appeals of the District of Columbia, affirming the decree of the Supreme Court of the District of Columbia, of May 15, 1900, with a modification, has been obeyed. The trustees appointed by the decree proceeded in the execution of the trust thereby reposed in them, and sold the property in controversy, at public auction, in accordance with the terms of said decree, to one John Miller, the holder and owner of certain of the bonds secured by said trust, for the sum of $7,000. The trustees reported the sale in the usual way, to the Supreme Court of the District of Columbia, and the same was finally ratified and confirmed. The proceeds derived from the insurance, amounting to the sum of $3,000, was paid over by the appellant, William G. Johnson, assignee as aforesaid, unto the said trustees, and said sum, together with the proceeds of sale, have been distributed to the present holders of the bonds secured by said deed of trust, and have passed beyond the control of the court. A reversal of the judgment of the Court of Appeals would not affect the title of the purchaser of said property, or invalidate in anywise the execution of the decree pronounced by the Supreme Court of the District of Columbia.

Morton's Admr. *vs.* Underwood et al., 49 Ala. 419.
Whiting *vs.* Bank of U. S., 13 Pet. 6.
Huyston's Iron Co. *vs.* Martin, 132 U. S. 96.
Jackson *vs.* Caldwell, 1 Cow. 641.
Taylor *vs.* Boyd, 3 Ohio, 337.
Gott *vs.* Powell, 41 Mo. 416.
McJilton *vs.* Lowe, 13 Ill. 495.
Reynolds *vs.* Harris, 14 Cal. 667.

The closing paragraph of appellants' brief, makes the extraordinary suggestion that appellees have now the power to abandon and nullify the sale made of the Maine property, and to bring that property to a resale, under this, or some other foreclosure proceedings. Just how this can be done, in the light of the facts disclosed in the record, the appellants fail to point out. A valid title to the property situated in Maine, could have been made either by sale under the deed of trust, in conformity with the power of sale therein contained, or by the judgment or decree of a competent court of the forum where the real estate is situated. By the terms of the trust, the sale must have taken place, in order to be valid, in the City of Bangor, State of Maine. Whether the sale of the 8th of September, 1894, should have been set aside for irregularity or not, is now too late to inquire. The appellants had not only constructive, but actual notice of the sale, and allowed two years and-a-half to elapse after such sale, without taking any steps in the forum where the transaction occurred, and where the real property is situated, to test its regularity, or to question its validity.

It is apparent that the bondholders, in any event, will be paid only about fifty per cent of the amount actually due them. This amount is being constantly depleted by the protracted litigation, much of which was unnecessary, which has extended over a period of more than eight years; and it is to be hoped that the judgment of this court will put an end thereto.

B. F. LEIGHTON,
*Attorney for Appellee.*

# Supreme Court of the United States.

No. 95.—October Term, 1902.

The American Ice Company and William G. Johnson, Assignee, Appellants, vs. The Eastern Trust and Banking Company. } Appeal from the Court of Appeals of the District of Columbia.

[February 23, 1903.]

The appellee herein was the complainant in the court of original juridiction and commenced its suit in the Supreme Court of the District of Columbia to foreclose a mortgage executed by the American Ice Company, one of the appellants, to the appellee as trustee, &c. Judgment of foreclosure was entered, from which an appeal was taken to the Court of Appeals of the District, where it was modified by reducing the amount of the indebtedness found due by the trial court and secured by the mortgage, and as so modified the judgment was affirmed. (17 D. C. App. 428; also reported on former hearing in the Court of Appeals, 14 D. C. App. 304. Another phase of the controversy appears in 6 D. C. App. 375, and 169 U. S. 295.)

The facts are somewhat numerous, but for the purpose of presenting the question discussed in the opinion herein the following only are necessary to be noticed:

The American Ice Company was a Maine corporation, and in that State it made a mortgage to the appellee, which was also a Maine corporation, to secure the payment of bonds executed by the ice company to the amount of $40,000, payable in installments of $5,000 each. The bonds were payable to the mortgagee or bearer, and all were duly sold and delivered to various persons for full value before maturity. The property mortgaged embraced real estate in Maine, and also certain real estate which the mortgagor claimed to own in the city of Washington, D. C., opposite square 270, and being within the limits of the bed of the Potomac River. On this property were erected a wharf and ice houses for storing and distributing the ice gathered in Maine and shipped to Washington. The mortgage contained the following provisions as to insurance:

"Article 7. The American Ice Company hereby expressly covenants and agrees to pay any and all taxes, assessments and governmental charges assessed or laid upon the property herein conveyed or intended so to be, and also to keep said premises and property at all times insured in such insurance companies as may be approved by the trustee, in such amounts as shall reasonably protect all the insurable property, payable in case of loss to the trustee as its interest may appear. In case of loss the insurance money may be applied by the trustee toward the renewal of or additions to the property destroyed or injured, or at the option of the trustee the money

may either be retained and invested in such securities as it approves, as a sinking fund for the redemption of the bonds when due, or be applied to the payment of the principal of such of the aforesaid bonds as may be at the time due and unpaid and of the interest which may at that time have accrued upon the principal and be unpaid, without discrimination or preference; and ratably to the aggregate amount of said unpaid principal and accrued and unpaid interest, rendering the surplus, if any, to the American Ice Company, or to whomsoever may be lawfully and equitably entitled to receive the same."

The mortgagor company thereafter fell into financial difficulties, defaulted in the payment of its bonds and other indebtedness, and on October 13, 1893, it made an assignment to William G. Johnson, the other appellant, as assignee, for the benefit of its creditors. The assignee took possession of the real property mortgaged and situate in Washington, and in November, 1896, took out fire insurance policies to the extent of $3,000 on the buildings and improvements on the Washington property, the premiums being paid from the assigned estate. On February 11, 1896, the buildings and improvements were destroyed by fire and the insurance moneys were paid to the assignee, who set up in his answer to the bill of foreclosure that he had taken out the insurance upon his separate interest as owner of the equity of redemption for the benefit of all the creditors of the ice company, secured and unsecured; while the trustee claims the insurance moneys for the benefit of the bondholders.

The trial court decreed the foreclosure of the mortgage and sale of the mortgaged premises, and in the event that the proceeds arising therefrom should be insufficient to pay the bonded indebtedness, it further decreed that the assignee should pay to the trustee the insurance moneys, or so much as might be necessary to pay the deficit, and that the trustee should apply the same as directed.

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

The appellants have made several assignments of error which have been argued before us, but the only one we think it necessary to notice is that which relates to the disposition of the moneys received by the assignee on account of the insurance effected by him upon the property destroyed by fire.

The assignee claims to be entitled to pay these moneys for the benefit of all the creditors, unsecured as well as secured, while the appellee, the trustee in the mortgage, demands that the moneys should be paid to it for the purpose of reducing the deficit which may arise from the sale of the mortgaged premises, and the courts below have so decreed. The claim of the appellee is founded upon the language used in the mortgage, by which the ice company was to keep the "premises and property at all times in-

sured . . . in such amounts as shall reasonably protect all the insurable property. . . . In case of loss the insurance money may be applied by the trustee toward the renewal of or additions to the property destroyed or injured, or, at the option of the trustee, the money may either be retained and invested in such securities as it approves, as a sinking fund for the redemption of the bonds when due, or to be applied to the payment of the principal" of such bonds, &c. This language, it is urged, takes the case out of the ordinary rule that a simple covenant to insure contained in a mortgage does not run with the land. The assignee appellant founds his claim upon the assertion that, as assignee, he was the owner of the equity of redemption, having an insurable interest in the premises as such, and that, in fact, he intended such insurance for the benefit of all creditors, and not as a fund for the security of the bondholders alone.

In *Farmers' Loan & Trust Co.* v. *Penn Plate Glass Co.*, (186 U. S. 434,) we had occasion to examine the nature and effect of a covenant to insure contained in a mortgage, and we concluded that such a covenant does not run with the land, so that one taking a conveyance subject to the mortgage comes under a primary obligation to insure. In that case the mortgage was foreclosed and the property bid in at the judicial sale, and the grantee of the Master took out insurance in his own name for the purpose of insuring his own interest in the premises which he had purchased, and he repudiated in terms any obligation to insure for the benefit of the mortgagee, and accordingly the policies were issued, and they stated they did not cover the mortgagee's interest in the premises.

Here there is in substance no difference between the mortgagor and its assignee for the benefit of creditors, so far as this question is concerned. The mortgagor had indeed failed to insure, as it had covenanted to do, but when it transferred the legal title of the property to its voluntary assignee, he stood in the shoes of his assignor, and when he took out insurance policies upon the property he in effect fulfilled the obligation which had rested upon the mortgagor to insure, and the insurance thus becomes by virtue of the covenant a security for the payment of the bonds secured by the mortgage. This does not make a case of a covenant to insure running with the land as against a subsequent purchaser of the property for value, but, as we have said, it is simply the case of a taking out of insurance by a voluntary assignee having no beneficial interest in the property, and when such assignee insures the premises under the circumstances herein stated, with such a covenant in a mortgage, the insurance moneys enure to the benefit of the bondholders secured by the mortgage.

It was conceded in the court below that, as a general proposition, a covenant to insure was a mere personal covenant, and did not attach to and run with the land, but it was held that the peculiar language of this mortgage took it out of that rule.

Mr. Chief Justice Alvey said in the Court of Appeals in this case:

"It is very clear that, by the terms of the covenant, it had relation to the land, and its principal object was to keep and maintain the buildings on the property in condition for carrying on the ice business. This was the great object of the insurance required, as means of security to the bondholders. Without this, the property, by fire, might be rendered of little value, and the bondholders be left without security. By means of the insurance it was intended that the property should be maintained as security; and hence it was provided, primarily, that the insurance money might be expended in renewal of or adding to the buildings. In such cases it has been repeatedly held that the covenant does run with the land, at least in an equitable sense; and where an insurance has been obtained, though by an assignee, and a fire has occurred, and the insurance money has been received, a court of equity has held that the insurance money should be applied for the benefit of those for whose protection the original covenant was made."

The cases of *Vernon* v. *Smith*, (5 Barn. & Ald. 7;) *Thomas* v. *Vonkapff*, (6 Gill. & John. 372;) *Miller* v. *Aldrich*, (31 Mich. 411;) *Ellis* v. *Kreutzinger*, (27 Mo. 311;) *Nichols* v. *Baxter*, (5 R. I. 491;) *Masury* v. *Southworth*, (9 Ohio St. 348,) and *In re Sands Ale Brewing Company*, (3 Biss. Rep. 175,) were cited by the Chief Justice in support of his contention.

In the case of *Wheeler* v. *Insurance Company*, (101 U. S. 329,) it was held that where a mortgagor is bound by his covenant to insure the mortgaged premises for the better security for the mortgagees, the latter have to the extent of their interest in the property destroyed, an equitable lien upon the money due from the policy taken out by him, and that this equity exists, although the contract provides that, in case of the mortgagor's failure to procure and assign such insurance, the mortgagees may procure it at the mortgagor's expense.

So in this case, we practically have a fulfillment of the mortgagor's covenant to insure, because its voluntary assignee, standing in its shoes, did himself insure the premises, and such insurance enures to the benefit of the mortgagee, because the assignee is a voluntary one, and is but carrying out an obligation imposed originally upon his assignor. The peculiar language of the mortgage upon the subject of insurance takes it out of the general rule governing such covenants.

We think the case at bar is not covered by the case of *Trust Company* v. *Penn Glass Company*, (186 U. S. *supra*,) and that the court below made the proper decree in relation to the insurance moneys.

We have examined the other assignments of error argued before us, but are of opinion that they are clearly untenable and were properly disposed of by the court below.

Finding no error in the record, the judgment is

*Affirmed.*